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A

TREATISE

ON THE

LAW OF SHIPPING

AND THE

LAW AND PRACTICE OF ADMIRALTY.

BY

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IN TWO VOLUMES.

VOL. II.

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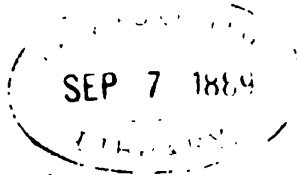
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**B O O K I.**  
**ON THE LAW OF SHIPPING.**  
**(CONTINUED.)**

**VOL. II.**

**1**





# A TREATISE

ON THE

## LAW OF SHIPPING AND ADMIRALTY.

---

### CHAPTER XIV.

#### OF THE DUTIES AND POWERS OF THE MASTER.

---

##### SECTION I.

##### OF THE FOUNDATION AND NATURE OF THE MASTER'S AUTHORITY.

THE master of a ship holds a peculiar and responsible position. As the owner is bound, in order that his ship may be seaworthy, to put in command of her a master who is fully competent in respect of skill, care, and honesty,<sup>1</sup> so the master is bound to all whose interests are under his charge, as owners of the ship, or hirers of it, or as owners of the goods, or even as insurers of the ship, goods, or freight, to use proper care and skill, and entire integrity in the protection and preservation of their interests. He must see to the lading of the goods on board; and take care that the dunnage, the stowage, and arrangement of the several articles are all that they should be. He must ascertain that the condition of the ship, as to her hull, rigging, and all appurtenances, and all provisions and supplies, is satisfactory. He must take on board and carefully preserve all such papers as the ship should carry and as fall within his duty. During the whole voyage he must conduct himself, not only under ordinary circumstances, but in all exigencies and emergencies, with due discretion, courage, and energy, and complete fidelity to his duties.

<sup>1</sup> *Propeller Niagara v. Cordes*, 21 How. 7.

If the ship be wrecked, or in peril, or arrested, or captured, it is his duty to stay by her as long as any rational possibility exists that any good can be done by him, nor should he desert her until all hope is gone; to use the common phrase among seamen, "the captain should be the last man to quit the ship."<sup>1</sup>

It is impossible to define all these duties, or state them in detail. Some of them, and some of the most important among them, arise only on extraordinary occasions; and must be measured and defined by the circumstances of each case, and the exigencies which it presents.

The master of a vessel at a foreign port has no authority to contract with the government of that country to convey its banished subjects to another country, and although he may justify what is done while in the foreign jurisdiction, yet as soon as he passes out of it he is guilty of a wrong, and liable criminally.<sup>2</sup>

In general, the established usage and custom of seamen, and the very nature of their duties, are the best, if not the only guide, in determining what they require. So, too, this usage gives them certain privileges, which are always subject to bargain between the owner and master, but are generally very similar in similar ships; as the privilege of carrying goods for himself, or for others, in certain parts of the ship, he receiving the freight, or a right to certain amount of tonnage.<sup>3</sup> So too he has his primage, which is a small percentage on the freight, and is a perquisite over and above his wages;<sup>4</sup> in this country it is, we believe, in foreign voyages

<sup>1</sup> Thus in *Propeller Niagara v. Cordes*, 21 How. 7, it was held that, after a vessel was stranded, the master was guilty of culpable negligence in leaving the vessel and going home, without taking care of the cargo.

<sup>2</sup> *Regina v. Lesley*, Bell, C. C. 220.

<sup>3</sup> *King v. Lenox*, 19 Johns. 235.

<sup>4</sup> *Scott v. Miller*, 5 Scott, 13, 15; 2 Molloy, ch. ix. s. v.; *Charleton v. Cotesworth*, Ryan & M. 175. And where goods, by the bill of lading, were to be delivered to the consignee, "he paying freight for the same as per charter-party, with primage and average accustomed," it was held that the master was entitled to receive primage from the consignee; although the contract between the ship-owner and the agents of the consignee (there being no charter-party) was for £ 5 per ton freight, and did not notice primage; and although the master contracted with the ship-owner to receive a sum certain, "in lieu of all cabin and other allowances, to commence from the day of victualling the ship, and for which he is to mess the officers." *Best v. Saunders*, Moody & M. 208. In *Vose v. Morton*, 5 Gray, 594, the bill of lading contained the usual clause, "with primage and

usually five per cent. After the voyage has commenced it seems that the owners have a right to change it reasonably and in good faith, and are then not liable to the master for all the wages or privileges previously stipulated for.<sup>1</sup>

The maxim that freight is the mother of wages does not apply to the case of the master, and, although he cannot sue the vessel *in rem*, yet the owners of the vessel are liable to him for wages in case of capture,<sup>2</sup> or shipwreck,<sup>3</sup> to the time of the dissolution of the contract.

If the master is hired by the general owners of the vessel, but paid by the charterers, he cannot recover of the latter for his services in superintending laborers employed by the owners and underwriters in saving the vessel and cargo.<sup>4</sup> But trustees who hold the title of a vessel, and control and manage her for the benefit of themselves and others, are liable for the wages of the master appointed by them.<sup>5</sup>

In a case where the master was to receive a certain sum per average accustomed." Held that *accustomed* qualified *primage* as well as *average*, and that evidence was admissible to show an universal and well-understood custom of the trade to pay no primage. In *Rennell v. Kimball*, 5 Allen, 356, the master of the vessel was to have five per cent on the gross earnings of the ship. At a foreign port the ship had earned a certain amount of money under a charter-party. The master received his primage on this amount there, and the agent of the vessel charged in his account of the disbursements of the vessel, a commission on the amount so paid. Held, that the master was liable therefor. We are unable to see any reason for this decision. It would seem clearly to be a charge on the ship, and not on the master personally.

<sup>1</sup> *Pawson v. Donnell*, 1 Gill & J. 1. It was held, in this case, that if by the exercise of this privilege a special injury is done to either party, the ship-owner must bear the loss and make a reasonable indemnity; also, that if, by the change, the captain is necessarily discharged from the performance of all his duties for which a remuneration has been stipulated, his claim to such remuneration is thereby extinguished, and that if part of the duties have been executed, then such a proportion of the stipulated compensation should be allowed as appeared just on comparing the services rendered with those which remained unperformed, and for the new part of the voyage the usual compensation should be paid, so that the parties should be placed in as nearly the same situation as possible, had a previous contract for the voyage as changed been entered into between them. See also Vol. I., p. 95, note 2, and p. 97, note 1.

<sup>2</sup> *Moore v. Jones*, 15 Mass. 424.

<sup>3</sup> *Hawkins v. Twizell*, 5 Ellis & B. 883, 34 Eng. L. & Eq. 195.

<sup>4</sup> *McGilvery v. Capen*, 7 Gray, 523.

<sup>5</sup> *Winsor v. Sampson*, 1 Sprague, 548.

month as wages and a commission of five per cent, and also a proportion of the profits, it was held that he could not traffic on his own account, for his own benefit.<sup>1</sup>

A master who takes his wife to sea with him without permission is liable for her passage.<sup>2</sup> So if he has permission to take his wife, and nothing is said about taking his child, he is liable for the child's passage.<sup>3</sup> But he is not bound to pay freight for a piano belonging to his wife, which is not an incumbrance, but is used by the passengers.<sup>3</sup> In the absence of any usage to the contrary, the expenses of rating and regulating a chronometer belonging to the captain, but which is used for the benefit of the ship, is to be borne by the ship, although there is another one on board belonging to the ship.<sup>3</sup> Nor is the master liable for the use of state-rooms which otherwise would have remained empty.<sup>3</sup> Nor for the use of an assistant steward who waited on the other passengers as well as on the captain and his family.<sup>3</sup>

A master of a vessel has been held liable to account to the managing owner for the passage-money due from passengers carried by him, even though the money never came into his hands.<sup>4</sup> In Calcutta, it is customary in warm weather for the master of a vessel to ride when employed in the ship's business, and in the absence of an express agreement to the contrary, such a charge would belong to the ship to pay, and not to the master personally.<sup>5</sup> In a case in Maine, the agreement was that

<sup>1</sup> *Mathewson v. Clarke*, 6 How. 122.

<sup>2</sup> *Rennell v. Kimball*, 6 Allen, 356.

<sup>3</sup> *Winsor v. Sampson*, 1 Sprague, 548.

<sup>4</sup> *Rennell v. Kimball*, 5 Allen, 356. The master was held liable in this case for passage-money under the following peculiar circumstances. The ship was chartered for a round voyage. The charterers had an agent in Calcutta, and a person who desired to come to this country went to him and paid him for his passage. This agent had charge of the disbursements of the vessel at Calcutta. The case was sent to a Master in Chancery, who found these facts, and also that for the voyage in question, under the charter-party, the owner was entitled to the cabin, for passengers, and that the master, although he acted in good faith, was liable for this amount. An exception was taken to this finding, but the ruling was sustained by the court, without assigning any reason therefor.

<sup>5</sup> *Rennell v. Kimball*, 5 Allen, 356. The case was heard by a Master in Chancery, who reported the fact of the existence of the usage, but also found that a special contract existed between the parties which took the case out of the

the master should receive twenty dollars per month and five per cent commissions. The vessel at the time was in another State. Afterwards, while the vessel was in a foreign country, he was discharged. Held, that he was entitled to his expenses incurred for the benefit of the vessel while the contract lasted ; that he was therefore entitled to his expenses in going to the vessel to take command, but was not entitled to his expenses incurred after he was discharged, for the purpose of getting home. During the time he was master he received some money as demurrage while the vessel was under a charter-party. Held, that he was entitled to his commissions on this.<sup>1</sup>

The powers of the master are not quite so indefinite, perhaps, as his duties. They rest upon certain ascertained principles, and are, for the most part, measured by exact rules. He is the agent of the owner ; appointed by him, and by that appointment authorized to act as his agent in all matters which are fairly embraced within the scope of his appointment.<sup>2</sup> To know what this authority is, in general, or under any particular circumstances, we may appeal to the law of agency, and the principles of that law which are applicable to the particular case. Thus, the universal principle, that he who appoints another to do anything for him, authorizes the person thus appointed to do whatever fairly and properly belongs to the doing of that thing, suffices for most of these questions. It is not, however, a rule equally universal, that authority to do a certain thing, always implies authority to do whatever can, in any emergency, become necessary for the doing of it. For, if circumstances should make an effort, expenditure, or sacrifice, necessary to the doing of the thing, which would cer-

usage. The evidence of the contract was that just before the vessel sailed the managing owner put in the hands of the master a letter containing the sentence, "I do not expect to pay any riding bills"; and that at the bottom of the letter the master wrote, "A duplicate received." The court overruled an exception to this finding; but gave no reasons therefor. We are unable to see on what grounds the acknowledging the receipt of a letter amounted to an assent to its terms.

<sup>1</sup> Woodbury v. Brazier, 48 Maine, 302.

<sup>2</sup> But the master of a ship has no more authority to bind his owners than any other agent has to bind his principal. Pope v. Nickerson, 8 Story, 465, 475. He is not the general agent of the owners. Mitcheson v. Oliver, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219, 232, per Parke, B.

tainly deter any reasonable man from doing it, the agent ought then to consider his authority as at an end.

Where the owner is himself present, or within easy access, that agency of the master which is founded on necessity disappears, for the necessity has ceased to exist.<sup>1</sup> We have seen that he may sell the ship when the sale is justified by a sufficient necessity;<sup>2</sup> but no necessity can be sufficient if the owner were so near that the master was not obliged to act without his instructions.<sup>3</sup> And if a master is specially empowered to sell a vessel in a particular manner, his principal is not bound if he exceeds his authority, the vendee knowing that the master was specially authorized.<sup>4</sup>

In the same way he may do many things abroad, which he cannot do at home; as to raise money on bottomry,<sup>5</sup> charter the ship,<sup>6</sup> or repair her or supply her needs.<sup>7</sup> As the rule is generally

<sup>1</sup> *Lister v. Baxter*, 2 Stra. 695; *Arthur v. Barton*, 6 M. & W. 138, 143, per Lord Abinger, C. B.; *Ship Lavinia v. Barclay*, 1 Wash. C. C. 49; *Patton v. Sch. Randolph*, Gilpin, 457; *Johns v. Simons*, 2 Q. B. 425; *Beldon v. Campbell*, 6 Exch. 886, 6 Eng. L. & Eq. 473. "But this doctrine cannot be safely extended to the case of an owner *pro hac vice* in command of the vessel. Practically this special ownership leaves the enterprise subject to the same necessities as if the master were master merely, and not charterer, and the maritime law gives him the same power to borrow to meet that necessity, as if he were not charterer." Per *Curtis, J.*, in *Thomas v. Osborn*, 19 How. 22, 29, deciding that the charterer has the power to bind the vessel for repairs though he may not have the power to bind the owners.

<sup>2</sup> See Vol. I., p. 68-74. But the master has no authority to sell part of a steamboat to a person for the purpose of keeping a bar. *Kelly v. Dickinson*, 15 Miss. 193.

<sup>3</sup> See Vol. I., p. 73, note 3.

<sup>4</sup> *Johnson v. Wingate*, 29 Maine, 404.

<sup>5</sup> See Vol. I., p. 140.

<sup>6</sup> See Vol. I., p. 276, note 3.

<sup>7</sup> As a general rule, in a foreign port, the master has authority to bind the owners for repairs, or supplies furnished the vessel, or to pledge the credit of the owners by raising money for necessary purposes. *Hoskins v. Slayton*, Cas. Temp. Hardw. 376; *Rich v. Coe*, 2 Cowp. 636; *Speering* (*Speerman*, in 2d ed.) v. *De-grave*, 2 Vern. 643; *Stewart v. Hall*, 2 Dow, 29; *Ex parte Bland*, 2 Rose, 91; *Webster v. Seekamp*, 4 B. & Ald. 352; *Arthur v. Barton*, 6 M. & W. 138, 143; *Edwards v. Havell*, 14 C. B. 107, 24 Eng. L. & Eq. 303; *Milward v. Hallett*, 2 Caines, 77, 81; *Marquand v. Webb*, 16 Johns. 89; *The Aurora*, 1 Wheat. 96; *Abbott v. Baltimore S. P. Co.* 1 Md. Ch. 542; *The Hilarity*, Blatchf. & H. Adm. 90; *The Gustavia*, id. 189; *Thomas v. Osborn*, 19 How. 22, 28; *Henshaw v. Rollins*, 5 La. 335. See also *James v. Bixby*, 11 Mass. 34.

stated, the master has authority in a foreign port to bind his owners. For the purposes of this rule the States of this country are considered as foreign as to each other.<sup>1</sup> Evidence of the name and place painted on the stern of a vessel is admissible to show to what port she belongs.<sup>2</sup>

To authorize the master of a vessel to bind any person as owner, it must appear that the master was at the time his agent.<sup>3</sup> And the tendency of the cases in England is to hold the person, furnishing necessities to a vessel at the request of the master, to a strict proof of this.<sup>4</sup>

If the master is also a part owner, he has authority to settle a claim for demurrage, and he would probably have this right if he were not a part owner.<sup>5</sup> Nor is it the place, which determines his power to do these things; for if he be abroad, and the

<sup>1</sup> *Stearns v. Doe*, 12 Gray, 482; *Bliss v. Ropes*, 9 Allen, 344; *Negus v. Simpson*, Sup. Jud. Ct. Mass. 1868.

<sup>2</sup> *Stearns v. Doe*, 12 Gray, 482.

<sup>3</sup> Thus in *Hussey v. Allen*, 6 Mass. 163, the vessel was owned by A and B at the time she left home. Subsequently supplies were furnished in a foreign port, and it appearing that A and B had parted with their interests in the vessel before this time, it was held that they were not liable. And in *Mackenzie v. Pooley*, 11 Exch. 638, 34 Eng. L. & Eq. 486, it was held that where the vessel was sold after she sailed, the vendee was not liable for money borrowed by the master to buy necessities in a foreign port, although at the time the defendant was the registered owner. See also *Dame v. Hadlock*, 4 Pick. 458; *Brooks v. Bondsey*, 17 Pick. 441.

<sup>4</sup> Thus, in *Mitcheson v. Oliver*, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219, the action was for goods sold and delivered, for work and materials provided, etc. The defendant was, during the repairs, and afterwards, the registered owner of the ship. One Christie appeared on the register as master from August 7, 1850, until September 14, 1852. On the latter day the name of Thompson was substituted. The plaintiff proved that the repairs and articles furnished were necessary, that they were furnished from October 10, 1852, to November 17th, of that year. During that time Thompson was on board acting as master, and gave the orders for the repairs. The defendant showed that on the 14th of July of that year he entered into an agreement to sell the ship to one Gompertz on certain conditions, he to have the possession of the ship to fit her for a voyage to Australia. Thompson was appointed by Gompertz, and the repairs and supplies were furnished while in his possession. Subsequently, the conditions being broken, the defendant took possession of the vessel again. Held, that he was not liable. This case virtually overrules *Frost v. Oliver*, 2 Ellis & B. 301, 20 Eng. L. & Eq. 114.

<sup>5</sup> *Alexander v. Dowie*, 1 H. & N. 152, 37 Eng. L. & Eq. 549.



owner be there also; or if an agent be there especially authorized and instructed by the owner upon these points, there is no necessity for the master's authority; and consequently it does not exist.<sup>1</sup> If, however, in a home port, and under the owner's eye, he makes contracts respecting the ship to which the owner assents in fact, or to which he justifies the other contracting party in believing that he assents,<sup>2</sup> or if he voluntarily accepts and retains the benefit of the contract when it is executed, when he is perfectly at liberty to return or renounce such benefit, in all such cases the owner is responsible, on general principles, as has been previously stated.

One general limitation of the power of the master to bind the owner by the contracts he makes for him, is this: they must relate to the condition, or the use and employment of the ship, and be within the usual duty and business of a master; and they must not be so unreasonable in themselves as to raise the sus-

<sup>1</sup> See *ante*, p. 8, note 1.

<sup>2</sup> In *The Sch. Tribune*, 3 Sumner, 144, the master of a vessel made a charter-party at a home port. It was held, under the circumstances, to be binding on the owners. Speaking of the power of the master, Mr. Justice Story said: "As to his right to make such a contract in the home port of the owners, I agree that it cannot be ordinarily presumed from his character as master. It is not an incident to his general authority; nor can it be presumed, under such circumstances, as an ordinary superadded agency. But there are peculiar circumstances, however, in the present case, which do create some presumption of such a superadded agency. In the first place, such had been his authority in the former voyages of the vessel; and such seems also to have been his authority under her subsequent employment. And I think it might fairly be presumed, that in the home port he would scarcely have had the rashness to make so important and definite a contract without some authority." And in *The Flash*, Abbott, Adm. 67, it was held that the master may make an ordinary contract of affreightment at the home port. The learned judge, in the case of *The Tribune*, *supra*, was also of opinion that one of the owners, who was the ship's husband, must have had full knowledge of what the master had done. But it is not sufficient that the master acted with the privity of the owner unless he was his agent. *Mitcheson v. Oliver*, 5 Ellis & B. 419, 32 Eng. L. & Eq. 219. And in *Jordan v. Young*, 37 Maine, 276, it was held, that the master of a vessel has no authority in a home port to order repairs, and that a vessel which is moored at the port adjoining that in which the owner resides is at her home port. But see *Provost v. Patchin*, 5 Seld. 235, where it is held that the master, as the general agent of the owners, has authority to bind them in a home port for necessary repairs, unless it can be shown that the owners themselves, or a ship's husband, managed the vessel, and that the party contracting with the master was aware of this.

picion that the contracting party acted fraudulently or recklessly in making them. By the general rule of the maritime law the master has the power to hire seamen, and the contract which he makes with them for wages is binding on the owners.<sup>1</sup>

If the master, while abroad, enters into a contract which binds the owner, that contract must be construed at home by the laws of the place where it was made, unless it is plain that it is to be executed at home, and under the home law.<sup>2</sup> But the master of a ship has the powers, as agent of the owner, which the laws of his own country give to him and no other, unless the owner expressly, or by some sufficient action, gives him more power or holds him out as possessing it.<sup>3</sup>

The master has no power, as agent of the owner, to settle, or deal with any claims or questions that do not accrue or arise while he is master.<sup>4</sup> If the contracts which he makes are in his own name, then it is said that the owner cannot be made liable for them, on the contracts.<sup>5</sup> But most maritime contracts on

<sup>1</sup> Some doubt has been expressed whether this rule applies to fishing voyages, but we think in the absence of a usage to the contrary the power of the master would be considered the same in voyages of this description as in freighting voyages. In *Sherwood v. Hall*, 3 Sumner, 127, in *Luscom v. Osgood*, 1 Sprague, 82, and in *Walcott v. Wilcutt*, U. S. D. C. Mass., Boston Courier, May 29, 1858, it was held, that the owners of a whaling ship were liable for damages for the abduction of a minor by the captain, although they had no personal knowledge of the fact, the act being held to be within the scope of the authority of the master as agent of the owners. In *Baker v. Corey*, 19 Pick. 496, it was held that the owners of a fishing vessel might hire men to navigate the vessel and to fish for the account of the owners, on wages instead of shares, and that although the master might not have this power *virtute officii*, yet if he were also a part owner, and the other owners did not interfere in the management of the vessel, he would be deemed their agent, and they would be bound by his acts.

<sup>2</sup> See 2 Parsons on Contracts, 94-100.

<sup>3</sup> *Pope v. Nickerson*, 3 Story, C. C. 465. The action in this case was assumed on four bills of lading. The question arose by what law the bills of lading were to be governed, whether by the law of Spain, where the contracts of shipment were made, or by the law of Pennsylvania, where the goods were to be delivered, or by the law of Massachusetts, where the owners resided, and to which the vessel belonged. The court held, that the laws of Massachusetts were to govern. See also *The Bahia*, Brow. & L. Adm. 292; *Peninsular Steam Nav. Co. v. Shand*, 3 Moore, P. C. N. s. 272; *The Packet*, 3 Mason, 255; *The Nelson*, 1 Hagg. Adm. 169. See *contra*, *Malpica v. McKown*, 1 La. 248; *Arayo v. Currel*, 1 La. 528.

<sup>4</sup> *Kelley v. Merrill*, 14 Maine, 228.

<sup>5</sup> *Garnham v. Bennet*, 2 Stra. 816; *Thorn v. Hicks*, 7 Cow. 697; *Hussey v.*

which the owner should be liable, give to the contracting party a lien on the ship, and through this, the owner may be indirectly reached. And it may well be doubted whether, in this country, the owner himself might not, generally, be made directly responsible.<sup>1</sup> The master is, in almost all cases, where he makes a contract for his ship, himself responsible;<sup>2</sup> as on all charter-parties or bills of lading signed by him.<sup>3</sup> And if goods on board are injured by the unskilfulness or wrong doing of the master, or of the crew without the fault of the master, or if they are stolen, or lost so as to make the owner responsible, the master, generally, would be responsible also;<sup>4</sup> for the maritime law considers both the owner and master as carriers of the cargo.<sup>5</sup>

Allen, 6 Mass. 163; James v. Bixby, 11 Mass. 34, 37; Wainwright v. Crawford, 3 Yeates, 131.

<sup>1</sup> See Phillips v. Tapper, 2 Barr, 323. In Negus v. Simpson, Sup. Jud. Ct. Mass. 1868, the owner of the ship *Rose Standish* was held liable on the following contract signed by the master:—

“Received of T. S. Negus & Co., on account of vessel and owners, a chronometer, name Negus, No. 1166, value two hundred and forty dollars, on hire, for the use of which we jointly and severally promise to pay to them at and after the rate of six dollars per month until the said chronometer shall be returned to them, or until they shall be served with a protest of the loss if any of the same. The said chronometer is to be used on board the good and seaworthy ship called the *Rose Standish*, whereof H. D. Hutchings of — is master, and bound for Callao and back, and is to be returned to the said T. S. Negus & Co. without expense to them, and without charge or claim for salvage or general average at the expiration of the present voyage, or within fourteen months from the date hereof, in the same good order as received. Insured by T. S. Negus & Co. against unavoidable damage or total loss by fire or water at sea: all and every other risk or risks whatsoever, are taken by the undersigned. Captain Hutchings has the privilege of buying this chronometer within six months from date for \$240 cash, without charge for hire, but is to pay insurance \$6 per six months, rate of one dollar per month. H. D. Hutchings, Master Ship *Rose Standish*, New York, November 20th, 1861.”

<sup>2</sup> Rich v. Coe, 2 Cowp. 636; Marquand v. Webb, 16 Johns. 89; James v. Bixby, 11 Mass. 34; Stocker v. Corlett, 1 Const. R. So. Car. 81. In Sydnor v. Hurd, 8 Texas, 98, the master was held liable on the following instrument: “Due Sydnor & Bone, or order, by Sch. Cornelius and owners for supplies and materials received, the sum of two hundred and six dollars. William Hurd.”

<sup>3</sup> Watkinson v. Laughton, 8 Johns. 213; The Sch. Leonidas, Olcott, Adm. 12, 15. But in an action of assumpsit for the breach of a contract of affreightment the owner and master should not be joined. Patton v. Magrath, Rice, 162.

<sup>4</sup> Morse v. Slue, 1 Vent. 190, 238; Barclay v. Cuculla y Gana, 3 Doug. 389; Watkinson v. Laughton, 8 Johns. 213.

<sup>5</sup> Elliott v. Rossell, 10 Johns. 1; Oakey v. Russell, 18 Mart. La. 58.

Although the master may, in a foreign port, make a charter-party which shall bind the owners, it is said that he cannot make either that or any other contract *under seal*, so as to bind them, without express authority.<sup>1</sup>

A master of a vessel which is a common carrier of passengers, may, it has been said, properly refuse a passage to a person who has been forcibly expelled from the place to which the vessel is going, by a vigilance committee, under threat of death if he return, and when the taking of such passenger would promote further difficulty; but this refusal should precede the sailing of the vessel. And if the passenger has violated no rule of the vessel in going aboard, and has conducted himself properly during the voyage, the master has no right to stop a returning vessel, put him aboard of it and send him back to the port of departure. And if he do so, he is liable in damages.<sup>2</sup>

An agreement of the owners with the master of a ship "to pay all legal expenses which may arise from his chastisement of the crew" has been construed to extend only to legal expenses incurred by him in groundless suits and prosecutions against him for chastisement of the crew within proper limits, and in lawful maintenance of the discipline of the ship.<sup>3</sup>

## SECTION II.

### OF THE MASTER'S POWER FROM NECESSITY.

As the master's power often arises from necessity, and is measured by it, it is important to ascertain what this necessity must be

<sup>1</sup> See Vol. I. p. 276, n. 3.

<sup>2</sup> *Pearson v. Duane*, 4 Wallace, 605. In *Chamberlain v. Chandler*, 3 Mason, 242, which was an action against a master of a vessel for ill-treatment towards his passengers on the voyage, Mr. Justice *Story* set forth at length the rights of passengers, and held that "their contract is not for mere ship-room, and personal existence on board; but for reasonable food, comforts, necessities, and kindness. It is a stipulation, not for toleration merely, but for respectful treatment, for that decency of demeanor which constitutes the charm of social life, for that attention which mitigates evils without reluctance, and that promptitude which administers aid to distress."

<sup>3</sup> *Babcock v. Terry*, 97 Mass. 482.

in each particular instance. For this necessity is very different, in different cases. Courts and text-writers use the same words in all these cases, saying in all alike that the master has the power *from necessity*; but they must mean very different things. Thus, we have already seen what the necessity is which alone gives the master power to sell the ship without consulting the owner.<sup>1</sup> And it is also true that he may borrow money and hypothecate the ship for it by a bottomry bond, if this be necessary.<sup>2</sup> And he may also bind the owner to pay for supplies and repairs, if those supplies and repairs were necessary.<sup>3</sup> We shall consider hereafter how far the vessel is liable for supplies and repairs furnished in a foreign port. The master has no power to draw upon the owners by a bill of exchange for supplies furnished in a foreign port, and render them liable as acceptors.<sup>4</sup>

To justify a sale, the necessity must be, as we have seen, of the most positive and stringent character. To make the owner responsible for repairs, however, it could not be necessary to show that the ship would have sunk or gone to ruin without them; for if they are, on the whole, reasonable and proper, that is enough.<sup>5</sup>

<sup>1</sup> See Vol. I. p. 68 - 74; *Brightman v. Eddy*, 97 Mass. 478.

<sup>2</sup> See Vol. I. p. 140.

<sup>3</sup> *Stewart v. Hall*, 2 Dow, 29; *The Aurora*, 1 Wheat. 96, per *Story, J.*; *The Ship Fortitude*, 3 Sumner, 228, 236; *Burquin v. Flinn*, 1 McCord, 316; *Milward v. Hallett*, 2 Caines, 77; *Rocher v. Busher*, 1 Stark. 27. See also *James v. Bixby*, 11 Mass. 34.

<sup>4</sup> *Bowen v. Stoddard*, 10 Met. 375; *May v. Kelly*, 27 Ala. 497.

<sup>5</sup> Mr. Justice *Story*, in the case of *The Ship Fortitude*, 3 Sumner, 228, 237, said: "In relation to what are necessary repairs in the sense of the law, for which the master may lawfully bind the owner of the ship, I have not been able, after a pretty thorough search into the authorities and text-writers, ancient and modern, to find it anywhere laid down in direct or peremptory terms, that they are such repairs, and such repairs only, as are absolutely indispensable for the safety of the ship, or the voyage, or that there must be an extreme necessity, an invincible distress, or a positive urgent incapacity, to justify the master in making the repairs. The general formulary of expression found to be laid down is, simply, that the repairs are to be necessary, without in any manner pointing out what repairs are, in the sense of the law, deemed necessary, or what constitutes the true definition of necessity. But a thorough examination of the common text-writers, ancient as well as modern, will, as I think, satisfactorily show, that they have all understood the language in a very mitigated sense; and that *necessary repairs* means such as are reasonably fit and proper for the ship under the circumstances, and not merely such as are absolutely indispensable for the safety of the

Again, the necessity which authorizes a borrowing on bottomry, is not the same as either of these; it need not be so stringent and extreme as the first; but it must be far greater than the second; it lies between them.<sup>1</sup> A difference exists, however, between the power of the master to sell or dispose of the ship and cargo, and his power to deviate,<sup>2</sup> to make a jettison of cargo,<sup>3</sup> or to cut away masts and rigging for the preservation of the vessel.<sup>4</sup> In these latter cases much must necessarily be left to the sound discretion of the master, and if it appears that there was an apparent necessity, that he acted with due deliberation, and with an honest intent to do his duty, the act is justified although it should appear that it was not the one best calculated for the safety and preservation of the property at risk.

In a recent case in Massachusetts, the power of the master in a foreign port to bind the owners for supplies furnished the vessel, was much considered by the court, and the following rules laid down: "He can only procure such supplies and repairs as are, properly speaking, necessary for the ship; that is, the repairs and supplies are to be such as are reasonably fit and proper, having regard to the exigencies and requirements of the ship for the port where she is lying and the voyage on which she is bound." . . . . "The true and only test by which to determine whether the master has acted within the limits of his authority is, to ascertain whether the articles or supplies, whatever may be their nature, were necessary under the circumstances in which the vessel was placed. . . . The necessity may vary according to the circumstances of each particular case, and when called in question in an action at law, it can only be determined by a jury, on a con-

ship or the accomplishment of the voyage." See also *Webster v. Seekamp*, 4 B. & Ald. 352; *Rocher v. Busher*, 1 Stark. 27; *United Ins. Co. v. Scott*, 1 Johns. 106; *Milward v. Hallett*, 2 Caines, 77; *Pratt v. Reed*, 19 How. 359.

<sup>1</sup> See Vol. I. p. 140. In *Pratt v. Reed*, 19 How. 359, 361, it was said that the only difference between a case of necessity which would authorize an *implied* hypothecation of the vessel for supplies or repairs, and that necessity which would justify the giving of a bond, was, that in the latter case the additional fact must appear, that the master could not procure the money without giving the extraordinary interest incident to that species of security.

<sup>2</sup> *Propeller Niagara v. Cordes*, 21 How. 7; *The Sch. Sarah*, 2 Sprague, 81.

<sup>3</sup> See Vol. I. p. 409, n. 1.

<sup>4</sup> *Patten v. Darling*, 1 Clifford, C. C. 254.

sideration of all the facts which go to make up the exigencies and requirements of the vessel at the time the articles were procured and the credit given.”<sup>1</sup> In England it is said that it must appear that it was necessary to pledge the credit of the owner for a thing which was necessary for the due prosecution of the voyage. Thus where several of the crew were injured by the tackle giving way when the vessel was weighing her anchor, and the captain took the men on shore and left them at the first public house, saying the owner would pay for the care taken of them, it was held that the owner of the vessel was not liable for food, lodging and medicine furnished the men, as it appeared that the vessel sailed with the remainder of the crew and other persons, and that there was no prospect at the time the seamen were taken ashore that they would be able to resume the voyage.<sup>2</sup>

The rule appears to be well settled in this country that the master has authority to borrow money not only for the purpose of buying necessaries, but to do it to pay for necessaries already bought.<sup>3</sup> And in one case in England no distinction was taken

<sup>1</sup> *Bliss v. Ropes*, 9 Allen, 341 – 343. In this case a suit was brought against the owner of a vessel to recover the value of a chronometer, and hire for the use of it. The chronometer was furnished the vessel in a State other than that to which she belonged, at the request of the master. In the court below, the plaintiffs asked the court to instruct the jury that if they were satisfied that a chronometer was, in the legal sense of that term, a necessary as applied to the vessel and her intended voyage, then the master had implied authority to bind his owners. This instruction was refused, and the court instructed the jury that the plaintiffs must satisfy them not only that the chronometer was reasonably fit and proper to be supplied to a vessel for the purposes of her voyage, but that it was a part of the apparel or furniture of the vessel, to be furnished by the owners. This last instruction was held to be incorrect, and a new trial was ordered. After stating the general rules given in the text, *Bigelow*, C. J. said: “Of course we speak only of articles designed and intended for the use of the vessel. Articles of a purely personal nature, obtained by the master for his own use and convenience, can never in any legitimate sense be deemed necessaries, for which the owners can be liable. But it is otherwise with supplies and implements which are used exclusively for purposes connected with the navigation of the vessel, and which are reasonably fit and proper for the prosecution of the voyage on which a vessel is bound.”— *Bliss v. Ropes* was affirmed in *Negus v. Simpson*, Sup. Jud. Ct. Mass. 1868. See also *Bond v. McKinnon*, 9 Allen, 344.

<sup>2</sup> *Organ v. Brodie*, 10 Exch. 449. See *post*, chapter on Seamen.

<sup>3</sup> *Davis v. Child*, *Daveis*, 71. And in *Thomas v. Osborn*, 19 How. 22, *Curtis*, J. said; “It is not material whether the hypothecation is made directly to the

between the power of the master to borrow to pay for supplies to be furnished, and his power to borrow to pay for supplies already furnished.<sup>1</sup> It has, however, been said, that the master has not authority to borrow money after the work has been done, for the purpose of paying the debts.<sup>2</sup> But the facts of this case did not call for so broad a rule as is there laid down.

furnishers of repairs and supplies, or to one who lends money on the credit of the vessel in a case of necessity to pay such furnishers. . . . The subject has been elaborately examined by Judge Ware in *Davis v. Child*, *Daveis*, 75, and we are satisfied he arrived at the correct result." In *Stearns v. Doe*, 12 Gray, 482, *Bigelow, J.* said: "The authority of a master to borrow money in a foreign port, on the credit of the owner, in his absence, and where there is no agent or consignee of the vessel, is clear and unquestionable. The limitation on this authority is equally clear. The money must be necessary for the vessel; that is, it must be required for purposes which a prudent person would deem to be reasonably fit and proper under the circumstances in which the vessel is placed. But we do not understand that a master can in no case borrow money on the credit of the owner to pay an existing liability, or a debt already incurred. There may be such a limitation on his authority where repairs have been done or supplies furnished on the personal credit of the owner, and without any stipulation for payment in ready money. *Beldon v. Campbell*, 6 Exch. 886. But no such restriction on the power of the master exists where a debt has been duly contracted, which constitutes a lien on the vessel or cargo, capable of immediate enforcement in a foreign court." The money in this case was lent to pay off the crew at the end of a voyage. See also *The Sophie*, 1 W. Rob. 368.

<sup>1</sup> *Robinson v. Lyall*, 7 Price, 592. The plaintiff, a shipchandler at Portsmouth, sued a ship-owner in London to recover money furnished the master to pay seamen's wages, and other debts contracted by the master for the use of the vessel at Portsmouth, on her return to England, after an absence of four years and a half. Some of the debts were contracted on the outward voyage. Held, that the owner was liable. In *Arthur v. Barton*, 6 M. & W. 138, the owner was held liable for money lent the master to procure necessities. In *Johns v. Simons*, 2 Q. B. 425, and in *Stonehouse v. Gent*, 2 Q. B. 431, the general authority of the master to borrow money was recognized, though it was decided in these cases that the owners were not liable, as communication might have been had with them. In *Edwards v. Havill*, 14 C. B. 107, the vessel was wind-bound at Newport. The owner resided at Exeter, one day's post from Newport. The master borrowed £5 from a broker to purchase provisions. The defendant contended that the master had no authority to charge the owner except in a case of necessity, and that there was no necessity in this case, because there was an opportunity to communicate with the owner. Held, that the jury were justified in inferring that there was such a reasonable necessity for borrowing the money as to render the owner liable, though there was no proof that the goods might not have been obtained by the master on his own credit.

<sup>2</sup> In *Beldon v. Campbell*, 6 Exch. 886, 6 Eng. L. & Eq. 473, the plaintiff was



We might go on and speak of other necessities and other powers springing from them, and endeavor to classify them. But it would accomplish no practical good; for after all, the only, and the reasonable rule must be, that the owner authorizes the master to do everything within the general scope of a master's employment, which a rational man might believe that a rational owner would certainly do for himself if he were present at that time and place.<sup>1</sup>

So a master may, if necessary, appoint another in his place; although generally, an agent cannot delegate his power or duty without especial authority; and the master so appointed by a master, may bind the owner in like manner as the original master might have done.<sup>2</sup> So a master duly appointed by a charterer, binds not only his immediate principal, the charterer, but also the ship. But if appointed by the charterer he would not, we think, bind the owner personally, without something from the owner, indicating, by word or act, that the master so appointed was also clothed with authority by the owner.<sup>3</sup> A master appointed abroad

a shipbroker at Newcastle, the defendant a ship-owner residing at Newport, within one day's post of Newcastle. A vessel of the defendant being off Newcastle, it was necessary to tow her in, and the master hired a tug. After his arrival he borrowed money of the plaintiff to pay for the tug. Some repairs being necessary, the master employed a shipwright, who, before the repairs were finished, applied for £10 to pay the workmen on Saturday night. This sum the plaintiff also lent. *Parke, B.*, held that the plaintiff could not recover, on the ground that the owner could have been communicated with, and that he was entitled to say from whom the master should borrow money. In the course of the argument, *Parke, B.*, said: "My notion is, that after the services are rendered, although the owner is liable for such services, the master has no right to change the creditor, which he does by borrowing." *Martin, B.*, also adopts this view.

<sup>1</sup> *Webster v. Seekamp*, 4 B. & Ald. 352. The question in this case was whether the owners of a vessel were liable for copper furnished by the order of the captain. The vessel was bound to the Mediterranean. It was proved that although it was extremely useful to copper vessels bound to that sea, yet it was not absolutely necessary, for many vessels went there without being coppered. The jury having found a verdict for the plaintiff, the court refused to set it aside. *Abbott, C. J.*, said: "I am of opinion, that whatever is fit and proper for the service on which a vessel is engaged, whatever the owner of that vessel, as a prudent man, would have ordered, if present at the time, comes within the meaning of the term 'necessary,' as applied to those repairs done or things provided for the ship by order of the master, for which the owners are liable."

<sup>2</sup> 1 Bell, Comm. 413.

<sup>3</sup> See Vol. I. p. 281. In *Breed v. Ship Venus*, U. S. D. C. Mass., 1805, it was

by a consul, or any official person, agreeably to the usage of merchants in the given case, has the same power.<sup>1</sup> So the master of a steamboat,<sup>2</sup> or of a privateer,<sup>3</sup> has similar powers; always under the definition or description we have given above, of the necessity which creates or confers those powers.

Even if the contract be without the usual scope of the master's employment, as the purchase of a cargo,<sup>4</sup> it may be adopted and confirmed by the owner; and such ratification may be express, or proved by acts which indicate such confirmation, or inferred from the voluntary acceptance and retaining of the cargo,<sup>5</sup> or from the fact that that owner had frequently and usually employed that master to act for him in that way.<sup>6</sup> But a master cannot, by any official or implied authority, annul or materially vary a contract expressly made by the owner himself; circumstances may change entirely, and it is perhaps possible that this change be such as to authorize the master to rescind or vary the owner's express contract; still, in point of fact, it may be said that nothing can raise a presumption of authority to do this;<sup>7</sup> nor can he bind the owner by a contract which is clearly neither necessary nor beneficial; as to carry goods in his ship free from freight and without any compensation whatever.<sup>8</sup>

held that charterers might lend money for the necessities of the ship to the captain of the ship appointed by themselves, and that a bond given to them by this master could be enforced against the ship.

<sup>1</sup> He may also give a bottomry bond. *The Zodiac*, 1 Hagg. Adm. 320; *The Nuova Loanese*, 22 Eng. L. & Eq. 623. In *The Cynthia*, 20 Eng. L. & Eq. 623, the consul appointed the master, and gave a bond himself. It was pronounced valid.

<sup>2</sup> *The Steamboat New World v. King*, 16 How. 469.

<sup>3</sup> We shall see, *post*, p. 28, n. 3, that the owner of a privateer are liable for the torts committed by the master, and it would follow that they are liable for his contracts.

<sup>4</sup> *Newhall v. Dunlap*, 14 Maine, 180; *Hewett v. Buck*, 17 Maine, 147; *Lyman v. Redman*, 23 Maine, 289.

<sup>5</sup> *Hewett v. Buck*, and *Lyman v. Redman*, *supra*. In the latter case, the owners of the vessel sent the cargo which the master had bought to another port. While on the way part was thrown overboard to save the ship, and on arrival the residue was sold and the proceeds applied to the repair of the vessel. Held, that this was a ratification of the purchase by the master. See also *Peters v. Ballistier*, 3 Pick. 495; *Hathorn v. Curtis*, 8 Greenl. 356.

<sup>6</sup> *Davis v. Marshall*, 4 Harring. Del. 64.

<sup>7</sup> *Burgon v. Sharpe*, 2 Camp. 529.

<sup>8</sup> See *Dewell v. Moxon*, 1 Taunt. 391, and cases Vol. I. p. 287, n. 2. But if a

It may, perhaps, be proper to remark, that the liability of the master and of the owner are both controlled by the rule, that any party who chooses to give credit to one only when he might have held others, cannot afterwards resort to those others. Thus, if one contracts for supplies to the ship with the owner exclusively, he can never look to the master;<sup>1</sup> and if with the master exclusively, he can never look to the owner.<sup>2</sup> And this exclusive credit may be proved either by words and express agreement, or by adequate circumstances. In the latter case, however, the circumstances must be such as would show conclusively that the creditor intended to charge the one, and not to charge the other; and it is doubtful whether a mere entry on his books charging either party would suffice to do this.<sup>3</sup> But it is customary for persons who deal in supplying vessels, to make the charge to the vessel itself, adding sometimes such words as "and all concerned in her."<sup>4</sup> This would be the same as to the ship "and owners."

The master can bind one who is actually an owner, although he is not registered as such, and his name does not appear on the papers of the ship.<sup>5</sup>

### SECTION III.

#### OF THE POWER OF THE MASTER OVER THE CARGO.

In regard to the cargo, the master stands in a somewhat different relation from that which he holds toward the ship. In general he is bound to receive the cargo, stow it properly, care for it during the voyage, carry it directly, and deliver it safely; and this comprises all his duties and all his powers. He may, indeed, be himself consignee or supercargo. Then he unites, but does not combine, these several offices. Generally, on the voyage, he will be regarded, in respect to the cargo, as only master of the ship.

custom is proved to carry a certain class of passengers free, the master can bind the vessel by giving such a free passage. *The Steamboat New World v. King*, 16 How. 469. See also *Philadelphia R. v. Derby*, 14 How. 468. And he can bind himself to carry the goods of a seaman free, and it would seem that he could also, in such a case, bind the owners. *Harrison v. Sch. Eclipse, Crabbe*, 223.

<sup>1</sup> *Farmer v. Davies*, 1 T. R. 108; *Farrel v. M'Clea*, 1 Dall. 392.

<sup>2</sup> See cases *ante*, p. 11, n. 5.

<sup>3</sup> See Vol. I. p. 103, n. 2.

<sup>4</sup> See Vol. I. p. 103, n. 2.

<sup>5</sup> See Vol. I. p. 42, n. 3.

But when the ship and cargo have reached their destination, and he then begins to deal with the cargo, the character of master drops, and that of supercargo or consignee begins. But still these functions may be in some degree contemporaneous, if not mingled. Thus, if at the port of destination he takes the goods on shore, in doing this he is a master, and when he disposes of them on shore, he is consignee.<sup>1</sup> But if he takes them on shore with the intent of there embezzling them, although the wrongful act begins when he is consignee, the wrongful intent in what he does as master makes it a barratrous act, or an offence as master.<sup>2</sup> So, if he makes a contract with a shipper which should give him a lien on the ship, it can only be when he makes it in his capacity of master.<sup>3</sup>

Generally, and in the exercise of his duties as master, he is a stranger to the cargo between the lading and the unloading. But

<sup>1</sup> See *United Ins. v. Scott*, 1 Johns. 106. If the master is unable to sell the cargo he may leave it with a commission merchant in good credit, and is not obliged to bring it home. *Day v. Noble*, 2 Pick. 615; *Lawler v. Keaquick*, 1 Johns. Cas. 174; *Stone v. Waitt*, 31 Maine, 409. It is the custom in many places for goods to be consigned to the master for sale and returns. It has been held that while engaged in the transportation of the goods he is a common carrier, while employed in selling, a factor, and while bringing back the proceeds, a carrier again. That the master is a factor while selling, is held in *Stone v. Waitt*, 31 Maine, 409; *The Waldo, Daveis*, 161. In *Moseley v. Lord*, 2 Conn. 389, however, it was held that the owner of the vessel was liable for the acts of the master in selling, on the ground that a consignment to the master was a consignment to him in his official capacity, and was the same as a consignment to the owners of the vessel, though it was admitted that if the consignment had been to the master by name, the result would have been different. In *Emery v. Hersey*, 4 Greenl. 407, *Kemp v. Coughtry*, 11 Johns. 107, and *Harrington v. M'Shane*, 2 Watts, 443, it was held that where the freight for the carriage of the goods was the only compensation paid, the owners of the vessel were liable as common carriers for the proceeds of the sale as well as for the safe transportation of the goods. But in a subsequent case in New York, it was held that where the master receives a commission for selling the goods, aside from the freight, he is to be considered as the agent of the shipper as to the sale, and the owner of the ship is only responsible for the safe transportation of the goods. *Williams v. Nichols*, 13 Wend. 58.

The power of the master to sell, when goods are consigned to him for that purpose, is not revoked by the owner selling them while the vessel is at sea, the master having no knowledge of the sale; and he is considered as the agent of the vendee until some one else is appointed to act for him. *Smith v. Davenport*, 34 Maine, 520.

<sup>2</sup> *Cook v. Com. Ins. Co.* 11 Johns. 40.

<sup>3</sup> See Vol. I. p. 173, n. 1; p. 187, n. 3.

exigencies and emergencies may arise, in which the master becomes, of necessity, supercargo or consignee, or to speak more correctly, is clothed with whatever agency or authority may be needed to enable him to protect the property and interests intrusted to him.<sup>1</sup> If the cargo is a perishable one, the master is bound to do all he can to preserve it.<sup>2</sup> If a cargo of hides is liable to perish from worms and the heat of the vessel, at an intermediate port, it is the duty of the master to preserve them by having them beaten or ventilated.<sup>3</sup> If goods are wet, he should, if it is possible, unpack and dry them.<sup>4</sup> For this purpose he may open the packages.<sup>5</sup> He is not, however, bound to repair the goods;<sup>6</sup> nor to delay his voyage for the sake of the goods.<sup>7</sup>

In case of capture the master should do all in his power to procure the restoration of the cargo,<sup>8</sup> but he is not bound to act fraudulently.<sup>9</sup> The question has arisen in the case of the seizure of the vessel and cargo for breach of a blockade, how far the act of the master in attempting to enter is to be considered as the act of the owner of the cargo. The general rule which has been laid down is, that if the vessel sails with a full knowledge that the port of destination is blockaded, there is a presumption that this is done with the full knowledge of the owner of the cargo, and he is not allowed to prove the contrary; but if the blockade is proclaimed subsequently to the sailing of the vessel, the shipper is not bound by the act of the master in seeking to enter after being warned off.<sup>10</sup>

<sup>1</sup> *The Gratitude*, 3 Rob. Adm. 240, 257; *Vlierboom v. Chapman*, 13 M. & W. 230, 239; *Douglas v. Moody*, 9 Mass. 548; *Gillett v. Ellis*, 11 Ill. 579.

<sup>2</sup> *The Brig Collenberg*, 1 Black, 170.

<sup>3</sup> *The Bark Gentleman*, Olcott, Adm. 110. This case was reversed on appeal, 1 Blatchf. C. C. 196, but the law on this point was not controverted. See also *Rogers v. Murray*, 3 Bosw. 357.

<sup>4</sup> *Chouteaux v. Leech*, 18 Penn. State, 224; *Propeller Niagara v. Cordes*, 21 How. 7; *Blocker v. Whittenburg*, 12 La. Ann. 410.

<sup>5</sup> *Bird v. Cromwell*, 1 Misso. 81.

<sup>6</sup> *Charleston Steamboat Co. v. Bason*, Harper, 262.

<sup>7</sup> *Steamboat Lynx v. King*, 12 Misso. 272; *Soule v. Rodocanachi*, 1 Newb. Adm. 504.

<sup>8</sup> It is sufficient if what he does is done in good faith, and he is only answerable for fraud or intentional neglect. *Cheviot v. Brooks*, 1 Johns. 364.

<sup>9</sup> *Hannay v. Eve*, 3 Cranch, 242.

<sup>10</sup> *The Adonis*, 5 Rob. Adm. 256; *The Brig Nayade*, 1 Newb. Adm. 366.

He may sell the whole cargo, if he can neither take it on nor transship it, and it is perishable and will be destroyed or importantly diminished in value, before he can obtain instructions from the owner.<sup>1</sup> So, too, he may sell a part of the cargo, in order to raise funds to pursue the voyage and carry on the remainder. But not until other means of raising money are exhausted, including the drawing of bills on the owner, hypothecating the ship, or making other use of the owner's property or credit. In regard to the exercise of this power, it can only be said that there must be an actual and urgent necessity; and as to the manner of its exercise, much must be left to the discretion of the master. If he acts in good faith, and under a sufficient necessity, for the best interests of all concerned, and with reasonable discretion, his acts will be valid. But it is not enough that he acts *bonâ fide* if no actual necessity existed.<sup>2</sup> And although the beneficial effect of the sale will extend to the ship, by enabling her to earn her freight, and even if the ship profit most by it, yet if a part of the purpose and effect be to carry on the cargo that is not sold, it will be justified as an act for the common benefit.

<sup>1</sup> But if the voyage is broken up, he cannot sell the cargo at the intermediate port to pay for advances to him to repair the vessel for a new voyage, or to pay seamen's wages. *Watt v. Potter*, 2 Mason, 77. A sale without necessity is invalid, and conveys no rights to the purchaser. *Freeman v. East India Co.* 5 B. & Ald. 617; *Morris v. Robinson*, 3 B. & C. 196; *Cannan v. Meaburn*, 1 Bing. 243; *Van Omeron v. Dowick*, 2 Camp. 42; *Wilson v. Millar*, 2 Stark. 1; *Ewbank v. Nutting*, 7 C. B. 797; *Campbell v. Thompson*, 1 Stark. 490; *Arthur v. Schooner Cassius*, 2 Story, 81; *Pope v. Nickerson*, 3 Story, 465, 504; *Dodge v. Union Ins. Co.* 17 Mass. 471, 478. See also the important case of *Post v. Jones*, 19 How. 150. In *Peters v. Ballistier*, 3 Pick. 495, a case where the same person owned both ship and cargo, it was held that the master had no authority to sell the cargo for the purpose of paying a debt of the owner, although the creditor threatened, in case of refusal, to detain the vessel and cargo by legal process. We have seen, Vol. I. p. 234, n. 2, when it is the duty of the master to transship, and also, Vol. I. p. 234, n. 3, that he is not obliged to do so if the goods are perishable in their nature.

<sup>2</sup> *The Gratitude*, 3 Rob. Adm. 240, 263; *Pope v. Nickerson*, 3 Story, 465, 491; *The Packet*, 3 Mason, 255; *The Joshua Barker*, Abbott, Adm. 215; *Myers v. Baymore*, 10 Barr, 114; *Stillman v. Hurd*, 10 Texas, 109; *United Ins. Co. v. Scott*, 1 Johns. 106; *Fontaine v. Col. Ins. Co.* 9 Johns. 29; *Searle v. Scovell*, 4 Johns. Ch. 218, 224; *Am. Ins. Co. v. Coster*, 3 Paige, 323; *Ross v. Ship Active*, 2 Wash. C. C. 226; *Underwood v. Robertson*, 4 Camp. 138. If the cargo belongs to the owner of the ship, the master may sell it at once for the benefit of the ship. *Ross v. Ship Active*, *supra*. See *Babcock v. Terry*, 97 Mass. 482.

## SECTION IV.

## OF THE LIEN OF THE MASTER.

As the master may raise money for the ship, or expend his own, or procure supplies, or make other necessary and beneficial contracts, and is personally bound on those contracts, out of this grows his lien on the ship or the freight, for whatever is due to him. How far this lien extends, and indeed in what cases it exists, the authorities do not, perhaps, enable us to state very positively. In England it has been held that he can have no lien on the ship,<sup>1</sup> and therefore none on the freight, because this is a mere incident to the ship.

Some early cases moderated the severity of this rule somewhat, and gave him this lien for his disbursements;<sup>2</sup> but they are now overruled.<sup>3</sup> And it has been held in a recent case that the master is not entitled to a lien on the freight in respect of expenses and liabilities incurred by him abroad in supplying provisions and putting up fittings, required by certain charter-parties concluded by him on behalf of the owner.<sup>4</sup> In this country, the law seems now to be, that the master has no lien on the ship for his wages,<sup>5</sup> or for

<sup>1</sup> *Wilkins v. Carmichael*, 1 Doug. 101; *Hussey v. Christie*, 9 East, 426; *The Johannes Christoph*, 33 Eng. L. & Eq. 600. But see *Watkinson v. Bernadiston*, 2 P. Wms. 367, note, where the Master of the *Rolls* decreed that sums disbursed by the captain on account of the ship in foreign ports, together with the wages of himself and crew, should be paid out of the proceeds of the ship, as they constituted a lien upon it.

<sup>2</sup> *White v. Baring*, 4 Esp. 22. So in equity, *Hussey v. Christie*, 13 Ves. 594; *Ex parte Halkett*, 3 Ves. & B. 135, 2 Rose, 194, 229, 19 Ves. 474; *Pierson v. Robinson*, 3 Swanst. 139, n.

<sup>3</sup> *Smith v. Plummer*, 1 B. & Ald. 575; *Atkinson v. Cotesworth*, 3 B. & C. 647, 5 Dowl. & R. 552; *Gibson v. Ingo*, 6 Hare, 112.

<sup>4</sup> *Bristow v. Whitmore*, 4 De Gex & J. 325, overruling s. c. *Bristow v. Whitmore*, 1 H. R. V. Johns. Ch. 96.

<sup>5</sup> *The Ship Grand Turk*, 1 Paine, C. C. 73; *Revens v. Lewis*, 2 Paine, C. C. 202; *Fisher v. Willing*, 8 S. & R. 118; *Gardner v. The New Jersey*, 1 Pet. Adm. 223; *Phillips v. The Thomas Scattergood*, Gilpin, 1; *Steamboat Orleans v. Phœbus*, 11 Pet. 175; *Willard v. Dorr*, 3 Mason, 91; *Dudley v. The Steamboat Superior*, U. S. D. C. Ohio, 3 Am. Law Register, 622; *Hopkins v. Forsyth*, 14 Penn. State, 34; *Richardson v. Whiting*, 18 Pick. 530; *Case v. Woolley*, 6 Dana, 17, 22. But if a person is merely called a master, but is not one in fact, he can proceed against the ship *in rem* for his wages. *L'Arina v. Brig Exchange*, Bee, Adm. 198.

his disbursements.<sup>1</sup> But for both of these he has a lien on the freight according to the best authorities.<sup>2</sup> But he has no lien for a general account.<sup>3</sup> If the cargo belongs to the owner of the ship, it has been held that the master has a lien on it for his disbursements.<sup>4</sup>

And if he has a lien on the freight, it would follow that he might detain the goods even against a shipper or consignee who had paid

<sup>1</sup> In *Gardner v. The New Jersey*, 1 Pet. Adm. 223, 226, it was held that a master who paid claims which were liens on the vessel, was substituted in place of the lien creditors, and acquired a lien on the vessel. See also *Bulgin v. Sloop Rainbow, Bee*, Adm. 116. Mr. Justice *Story*, in the *Ship Packet* 3 Mason, 255, 263, suggested that the master might have a lien on the ship, where he used his own money to repair her in preference to borrowing on bottomry. But that he did not mean to express an opinion that generally a master has a lien on the ship for disbursements is evident, for in *Steamboat Orleans v. Phœbus*, 11 Pet. 175, he expressly states that this right does not exist. In a case before Mr. Justice *Curtis*, the whole question was learnedly examined, and it was held that no lien on the ship existed. *The Larch*, 2 Curtis, C. C. 427. See also *Hopkins v. Forsyth*, 14 Penn. State, 34. By an early statute in Connecticut, the master, in case of the neglect of the part-owner to furnish the outfits, could supply them and look to the vessel, but had no personal remedy against the owner. *Brook v. Williams*, 2 Root, 27. In *Ex parte Clark*, 1 Sprague, 69, the master of a vessel, who had expended his money for the necessary disbursements of the vessel abroad, petitioned to be allowed the amount out of the estate of the sole owner, who had become a bankrupt; and the petition was allowed.

<sup>2</sup> That he has a lien on the freight for his disbursements, see *Lane v. Penniman*, 4 Mass. 91; *Lewis v. Hancock*, 11 Mass. 72. In this case the court said: "He may be understood, as against the owner himself, to have the same right in the freight-money which a factor or consignee has in the goods of the principal or consignor, for whom money has been advanced, or any liabilities have been incurred, in consequence of the employment or consignment. The master of a vessel in a foreign port, and at home after a voyage performed, has many liabilities, from which he may have cause to protect himself, by insisting on his right to collect the freight-money." See also *Ingersoll v. Van Bokkelin*, 7 Cow. 670, 5 Wend. 315; *The Ship Packet*, 3 Mason, 255; *Drinkwater v. Brig Spartan, Ware*, 149; *Richardson v. Whiting*, 18 Pick. 530. If by the shipping articles the master is directly responsible to the seamen for their wages, it would seem that he might retain the freight to indemnify himself. See *Goodridge v. Lord*, 10 Mass. 483. In regard to his lien on the freight for his wages, see *Drinkwater v. Brig Spartan, Ware*, 149; *Richardson v. Whiting*, 18 Pick. 530, 532. In *Ingersoll v. Van Bokkelin*, 7 Cow. 670, the Supreme Court held that he had a lien on the freight for his wages, but this decision was reversed by the Court of Errors, 5 Wend. 315.

<sup>3</sup> *Shaw v. Gookin*, 7 N. H. 16. See also *Hodgson v. Butts*, 3 Cranch, 140.

<sup>4</sup> *Newhall v. Dunlap*, 14 Maine, 180.



the freight to the owner of the ship, if the consignee had been duly notified by the master of his claim and lien, and ordered not to pay the owner.<sup>1</sup> And generally it is not only his right, but his duty, to collect the freight, but this power may be taken away from him by an assignment by the owner;<sup>2</sup> but the court will not grant an injunction to prevent him from collecting it, although the freight has been assigned by the owners to a third person, if it does not appear that the master is about to make an improper use of the money.<sup>3</sup>

## SECTION V.

### HOW FAR THE OWNER IS LIABLE FOR THE TORTS OF THE MASTER.

The owner is liable not only upon the contracts of the master of the kind above designated, but also for his wrong-doings, and the injuries resulting from them, to a certain extent.<sup>4</sup> We consider that the principles of the law of agency, or of the relation of master and servant, suffice to measure this liability and to determine where it exists. Thus, the vessel and owners are liable for the delay of the master in presenting a proper manifest so that the owner of goods can pass his property through the custom-house, but they are not responsible for a tortious endeavor on the part of the master to prevent the owner from obtaining his goods.<sup>5</sup> If a vessel is chartered, and the master is the agent of the owners, it is

<sup>1</sup> See Vol. I. p. 306, n. 3.

<sup>2</sup> The Edmond, Lush. Adm. 57.

<sup>3</sup> Guion v. Trask, 1 De Gex, F. & J. 373.

<sup>4</sup> By the general rule of the maritime law, the owners of a vessel are liable for all injuries caused by the misconduct, negligence, or unskilfulness of the master, provided the act be done while acting within the scope of his authority as master. Beawes, *Lex Mercatoria* (4th London ed.), 54; *Stinson v. Wyman*, Daveis, 172; *The Waldo*, Daveis, 161; *Dusar v. Murgatroyd*, 1 Wash. C. C. 13, 17.

The owner of a vessel is liable for the tort of the master in shipping a minor without the consent of his father, if the master knew this fact at the time; the knowledge of the servant being considered equivalent to knowledge by the principal. See *ante*, p. 11, n. 1.

<sup>5</sup> *The Zenobia*, Abbott, Adm. 80, 93. So in *The Aberfoyle*, Abbott, Adm. 242, 1 Blatchf. C. C. 360, it was held that a vessel was liable *in rem* for the wrongful act of the master in putting a passenger on short allowance, unless it was proved that the master's act was malicious and wrongful.

his duty to collect the freight-money for the benefit of the charterers; and if he neglect to do so his owners are liable, unless the charterers directed some other person to collect it.<sup>1</sup> So the owners are liable for the negligent act of the master in overloading a wharf, whereby goods were injured, although there had been a constructive delivery of the goods.<sup>2</sup> And if a master, by want of skill or care, brings his ship while navigating her into collision with another and inflicts injuries thereby, the owner is certainly liable.<sup>3</sup> But it has been held that the owners are not liable for a wilful collision.<sup>4</sup> So if the master embezzles goods put on board, the owner is liable.<sup>5</sup> But he is not liable if the master embezzles or injures goods which he took on board to fill his own privilege,

<sup>1</sup> *Welch v. McClintock*, 10 Gray, 215.

<sup>2</sup> *Kennedy v. Dodge*, U. S. D. C. New York, *Shipman*, J. 1867.

<sup>3</sup> *The Thames*, 5 Rob. Adm. 345; *Stone v. Ketland*, 1 Wash. C. C. 142; *Martino v. Boggs*, 1 La. Ann. 74. See also chapter on Collision, Vol. I.

<sup>4</sup> *The Druid*, 1 W. Rob. 391; *Richmond Turnpike Co. v. Vanderbilt*, 1 Hill, 480, 2 Const. 479. See *The Ida*, Lush. Adm. 6; *The Seine*, Swabey, Adm. 411. A contrary decision was, however, given in *Ralston v. The State Rights*, Crabbe, 22, 44, on the authority of the distinction pointed out by Mr. Justice *Washington* in the case of *Dias v. Privateer Revenge*, cited in a subsequent note. Judge *Hopkinson* said: "In the case now before this court, I do not understand it to be denied, that the owners of a vessel are answerable for the acts of their captain done within the course and scope of his employment and business. Is this not enough for this case? Assuredly it was within the course and scope of the employment and authority of Captain Allen to direct the State Rights to be steered at his pleasure; he had full power to do this, derived from his owners, and all on board were to obey his orders, without interposing their judgment as to the consequences to him or his owners. If by the execution of such an order a wrong is done to another party, on what principle of the common or maritime law can the owners of the offending vessel, the principals of such an agent, whom they have armed with the power to do the wrong, throw the responsibility from themselves? It is widely different from the case of the commission of a crime by the captain, which cannot be imputed to his owners, or be intended to come within the employment or authority committed to him." In *Duggins v. Watson*, 15 Ark. 118, a party who owned goods on board one vessel, brought an action against the owners of a colliding vessel, and the court ruled that he was entitled to recover, although the collision was wilfully caused by the master of the colliding boat. This case was decided on the authority of *Philadelphia R. v. Derby*, 14 How. 468, cited *post*, p. 30, n. 2; but it does not fall within the exception upon which that case rested, and was wrongly decided, unless the principles contended for by *Hopkinson*, J., in the above case, be correct.

<sup>5</sup> *Boucher v. Lawson*, Cases temp. Hardw. 78, 193.

and received all the freight, commissions, and profits on them.<sup>1</sup> Nor is he responsible for goods clandestinely taken on board by the master, when the owner is himself on board, managing the lading of the vessel, or appointing an agent expressly therefor, and employing the master only in navigating the ship, and the shipper either did know this, or has sufficient notice to put him on his guard.<sup>2</sup> The owners of a privateer are responsible for the torts of the officers and crew committed in the exercise of their employment,<sup>3</sup> but they are not liable for piratical acts committed by such

<sup>1</sup> *King v. Lenox*, 19 Johns. 235; *Boucher v. Lawson*, Cases temp. Hardw. London ed. 85, 194, Dublin ed. 78, 183. But in *Phile v. The Anna*, 1 Dall. 197, an owner of a vessel was held liable for the tort of the master in smuggling goods which were part of the master's privilege, and did not belong to the general cargo of the ship.

<sup>2</sup> *Walter v. Brewer*, 11 Mass. 99; *Reynolds v. Toppan*, 15 Mass. 370; *Ward v. Green*, 6 Cow. 173. In *Walter v. Brewer*, the owner was with his vessel at Monte Video, for the purpose of taking a cargo for himself, and not intending to take freight for others. The master, without the knowledge of the owner, took on board a few bales of Nutria skins, to carry to Boston. It was in evidence that the bales would not more than fill the "privilege," which the masters of vessels, in a case like that, were accustomed to have. The judge, at *Nisi Prius*, instructed the jury, "That, although the owners of ships were generally liable for the contracts of their masters abroad touching the ship on the voyage; yet, as the owner, in this instance, had himself gone in the ship, for the purpose of procuring a cargo, and as the ship was not put up for freight, and as the defendant was not consulted respecting this shipment, nor the persons who attended to his business in his absence, but they were taken on board without his knowledge, he was not accountable originally for the safe transportation and delivery of the goods; but that, if the jury believed that the defendant knew, before his ship sailed from Monte Video, that these bales had been taken on board by the master, he must be considered as having adopted the act of the master, and as having consented thereto, and so would be accountable." These instructions were held to be correct, with the exception that it was not sufficient to charge the owner that he knew that the goods were taken on board, but that he must have "knowledge that the goods were received on board upon freight." In *Nichols v. DeWolf*, 1 R. I. 277, it was held that where an owner sent a vessel on his own account, the master as such had no authority to sign bills of lading." But in *Murfree v. Redding*, 1 Hayw. 276, the owner denied his liability for the breach of a contract of affreightment entered into by the master, on the ground that the latter was put on board merely to navigate the vessel. But the court were of opinion that as he was held out as master, the contract being within the scope of his authority, the owner was liable.

<sup>3</sup> *The San Juan Baptista*, 5 Rob. Adm. 33; *The Karasan*, id. 291; *Die Fire Damer*, id. 357; *Nostra Signora de los Dolores*, 1 Dods. 290; *L'Invincible*, 1 Wheat. 238; *The Anna Maria*, 2 Wheat. 327; *The Amiable Nancy*, 1 Paine,

officers and crew.<sup>1</sup> All of these cases, and very many more of a like kind, resolve themselves into this rule; that the owner is responsible for the direct consequences of any wrong-doing of the master, which is done by him as master, in the discharge of his duty, and under the authority given him as master.<sup>2</sup> And here, as in most cases under the law of shipping, the established usage of the port, or of the trade in which the vessel is employed, is of great importance. The question how far the owners of a vessel are liable for the wilful and malicious act of the master, is one of

C. C. 111, 3 Wheat. 546; *Talbot v. The Commanders of Three Brigs*, 1 Dall. 95; *Del Col v. Arnold*, 3 Dall. 333; *Arnold v. Del Col*, Bee, Adm. 5; *Gibbs v. The Two Friends*, Bee, Adm. 416. In *The Amiable Nancy*, *supra*, a doubt was expressed whether the liability extended to personal trespasses committed by the master and crew against persons on board the prize. Some of the cases above cited would seem, however, to extend the liability of the owners to a greater extent than more modern cases would justify.

<sup>1</sup> *Dias v. The Privateer Revenge*, 3 Wash. C. C. 262, 268. This case might seem to countenance a distinction which has been sometimes taken between mere torts and offences for which the master is criminally responsible. See *Ralston v. The State Rights*, *Crabbe*, 22.

But the writers on maritime law do not appear to make any distinction in this respect between acts which are criminally punishable, and such as are not, nor is it apparent how they could do so, save in the case of offences against the law of nations; and Dr. *Lushington*, in the case of *The Druid*, 1 W. Rob. 391, intimated that he believed none to exist. In *Manro v. Almeida*, 10 Wheat. 473, it was argued that, as the trespass complained of was alleged to have been piratically done, the civil remedy merged in the crime. The court said: "But this we think, clearly, cannot be maintained. Whatever may have been the barbarous doctrines of antiquity about converting goods piratically taken into droits of the admiralty, the day has long gone by since it gave way to a more rational rule, and the party dispossessed was sustained in his remedy to reclaim the property as not devastated by piratical capture."

<sup>2</sup> *Dias v. The Privateer Revenge*, 3 Wash. C. C. 262, 268. The decision of the learned judge in this case goes very thoroughly over the whole question, and draws the distinction between a wilful act done while the servant is engaged in the prosecution of his master's business,—as when the master of a vessel commits spoliation on property rightfully seized as a prize, in which case the owners of the vessel would be liable,—and an act wholly out of the scope of his employment, as a piratical seizure. The distinction here pointed out was acted upon in the case of *Ralston v. The State Rights*, *Crabbe*, 22, which case we have referred to more at length, *ante*, p. 27, n. 4, but what we consider to be the true doctrine of the common law is stated by Mr. Justice *Cowen*, in *Wright v. Wilcox*, 19 Wend. 343, 345, to be that the law holds every wilful act to be a departure from the master's business.

great difficulty, especially when such act is done by the master while employed in the usual course of his business. It is said in one case that the liability of the owners depends on the general principles of the maritime law, and not on any special contract.<sup>1</sup> But their liability may undoubtedly be increased by a special contract, and the distinction has been taken in some recent cases between the act of the master towards one to whom the owner owes no more duty than one citizen owes to another, and his act when this duty is increased by reason of a special contract or an obligation imposed upon him by virtue of his office as carrier. In such a case it would seem that the owner is liable even for the wilful tort of his servant, if it was committed while in his employ and in the management of the conveyance under his control, although the wrong was done in direct opposition to the express commands of the owner.<sup>2</sup> And if the owners are obliged to pay damages for the wrong-doing of the master, they have their remedy over against him.<sup>3</sup> And the master is liable if he violates any of the material

<sup>1</sup> Dean v. Angus, Bee, 369, 375.

<sup>2</sup> This was so held in Weed v. Panama Railroad Co. 5 Duer, 193, 17 N. Y. 362, where a conductor on a railroad stopped and detained the train in a swamp during the night, and the company was held liable for the injuries sustained by a passenger in consequence thereof. In a late case in the Supreme Court of the United States, Philadelphia R. v. Derby, 14 How. 468, the defendant in error was riding in a train, on the railroad of the plaintiffs, which came into collision with another train belonging to the same company, whereby he was injured. The accident was caused solely by the engineer of the colliding train running his engine on a track over which he had received express orders not to go. It was held that the company was liable. The court said: "We find no case which asserts the doctrine that a master is not liable for the acts of a servant in his employment, when the particular act causing the injury was done in disregard of the general orders or special command of the master. Such a qualification of the maxim of *respondeat superior*, would, in a measure, nullify it." In Keene v. Lizardi, 5 La. 431, the owners of a vessel were held liable for the misbehavior of the master to passengers. See also St. Amand v. Lizardi, 4 La. 243; Block v. Bannerman, 10 La. Ann. 1.

In Malpica v. McKown, 1 La. 248, it was held that the owner was liable for money of a deceased passenger converted by the captain to his own use. And in Arayo v. Currel, 1 La. 528, where the master, the ship having run aground, told the passengers to go on shore, in order that the ship might be lightened, and after the ship was got off he sailed away without them, it was held that the owner was liable. See Sunday v. Gordon, Blatchf. & H. Adm. 569.

<sup>3</sup> Dean v. Angus, Bee, Adm. 369; Purviance v. Angus, 1 Dall. 180.

orders and instructions under which he sailed.<sup>1</sup> If the master of a vessel wrongfully detains the clothing of a seaman, the owners are not liable therefor, unless they have ratified the acts of the master, or upon demand have refused to deliver it.<sup>2</sup>

<sup>1</sup> *Brown v. Smith*, 12 Cush. 366. In this case it was held that the master was liable for the reasonable expense of bringing the vessel home from the port to which he had wrongfully navigated her, and for reasonable damages for breaking up the voyage, but not for the conjectural or possible profits of the voyage; and that the collection from him of a part of the proceeds of a wrongful sale of some of the property on board was no bar to an action against him for breaking up the voyage and disposing of the property, but went merely in reduction of damages.

<sup>2</sup> *The Hibernia*, 1 Sprague, 78.

## CHAPTER XV.

## OF THE SEAMEN.

## SECTION I.

## HOW SEAMEN ARE REGARDED BY THE COURTS.

THE common-law courts in some degree, and admiralty courts still more, regard seamen as peculiarly in need of, and entitled to, the protection of the courts, because peculiarly exposed to the wiles of sharpers and unable to take care of themselves.<sup>1</sup> The

<sup>1</sup> Mr. Justice Story, in *Harden v. Gordon*, 2 Mason, 541, 555, states the law with great accuracy: "Every court should watch with jealousy any encroachment upon the rights of seamen, because they are unprotected and need counsel; because they are thoughtless and require indulgence; because they are credulous and complying, and are easily overreached. But courts of maritime law have been in the constant habit of extending towards them a peculiar protecting favor and guardianship. They are emphatically the wards of the admiralty; and, although not technically incapable of entering into a valid contract, they are treated in the same manner as courts of equity are accustomed to treat young heirs, dealing with their expectancies; wards with their guardians, and *cestuis que trust* with their trustees. The most rigid scrutiny is instituted into the terms of every contract in which they engage. If there is any undue inequality in the terms, any disproportion in the bargain, any sacrifice of rights on one side which are not compensated by extraordinary benefits on the other, the judicial interpretation of the transaction is, that the bargain is unjust and unreasonable, that advantage has been taken of the situation of the weaker party, and that *pro tanto* the bargain ought to be set aside as inequitable." In *The Bark Rajah*, 1 Sprague, 199, the owners of the vessel set up, in defence, to an action for wages, that the libellant had transferred his wages to third parties by an order which they had accepted. The court held on the evidence that the acceptance was subsequent to a direction by the libellant not to pay anything to the payees. The owners had also refused to take a bond of indemnity. It appeared that, on the arrival of the ship, the libellant was induced to go to the store of the payees, and was by them furnished with clothing to the value of \$ 28.37, watch and chain \$ 30.00, and \$ 2 in cash, which, with a charge of fifty cents for boating, amounted to \$ 60.87. In payment, the libellant gave them an order on the owners for the full amount of his wages, amounting to \$ 154.73. The watch and chain were returned within a few

statutes of England and of this country contain many provisions in their behalf, and in some respects we carry them further than any other nation. Early in our legislation there was a prohibition against the shipping on board of our vessels of foreign seamen not naturalized.<sup>1</sup> But this act was made to apply only to the subjects and citizens of countries which prohibit the employment in their vessels of our citizens;<sup>2</sup> and as these are very few, this circumstance and the necessities of commerce have caused this statute to be very seldom regarded or enforced, and in 1864 it was repealed.<sup>3</sup>

The repealing act, however, provides that officers of vessels of the United States shall in all cases be citizens of the United States. By act of 1866,<sup>4</sup> seamen are prohibited wearing sheath-knives, and it is made the duty of the master or other officer in command of the vessel, under a penalty, to inform every person offering to ship of the provisions of the law, and to require his compliance with it.

The act of 1803, c. 10,<sup>5</sup> provides that no master of a vessel or any other person shall import or bring any negro, mulatto, or other person of color, not being a native, a citizen, or registered seaman of the United States, or seamen natives of countries beyond the Cape of Good Hope, into any port or place of the United States situated in any State which by law has prohibited the admission or importation of such person. This act, it is held, does not apply to colored seamen employed in navigating the vessel which brings them.<sup>6</sup> In some of the southern States of this country, laws were formerly in force prohibiting the coming into the State of any free negro or colored person as seaman or passenger on any vessel, and providing for the imprisonment of such person during the stay of the vessel in the port.

days, but were refused. They were proved not to be worth more than \$ 20.50. Held, that the libellant was entitled to rescind the contract as to the watch and chain, and was entitled to the full amount of his wages, deducting the value of the other articles, and money advanced by the payees of the order.

<sup>1</sup> Act of March 3, 1831, c. 42, 2 U. S. Stats. at Large, 809.

<sup>2</sup> Ibid. § 10.

<sup>3</sup> Act of 1864, c. 170, 13 U. S. Stats. at Large, 201.

<sup>4</sup> Ch. 286, 14 U. S. Stats. at Large, 304.

<sup>5</sup> 2 U. S. Stats. at Large, 205.

<sup>6</sup> The Brig *Wilson v. The United States*, 1 Brock. C. C. 423.



These laws have been held to be unconstitutional,<sup>1</sup> but the seaman so imprisoned has no right of action against the master on account of such imprisonment, nor can the master deduct from his wages the expenses of the imprisonment.<sup>2</sup>

The most important points in which the statutes of the United States provide for the protection of our sailors are in relation to, 1st. The shipping articles; 2d. Wages; 3d. Provisions and subsistence; 4th. Seaworthiness of the ship; 5th. The care of seamen in sickness; 6th. The return of seamen to this country; 7th. Disobedience of seamen; 8th. Provisions in respect to desertion and discharge, either at the beginning or during the course of the voyage. The principal statutes on these subjects we shall give in our Appendix. Here we shall state generally the purport and effect of these provisions, and of the adjudications respecting them.

## SECTION II.

### OF THE SHIPPING ARTICLES.

Every master of a vessel bound from a port in the United States to any foreign port,<sup>3</sup> or of any ship or vessel of the burden of fifty tons or upwards, bound from a port in one State to a port in any other than an adjoining State, is required to have shipping articles, under a penalty of twenty dollars for every person who does not sign,<sup>4</sup> which must be signed by every seaman on board, and these must declare "the voyage or voyages, term or terms of time,

<sup>1</sup> Opinion of *Johnson, J.*, in *Elkison v. Delieasseline*, U. S. D. C. South Carolina, Appendix, p. 27, to Report No. 80, House of Representatives, 27th Congress, 3d session; *The Cynosure*, 1 Sprague, 88. A contrary ruling was made by *Gilchrist, J.*, in the case of *Roberts v. Yates*, U. S. C. C. South Carolina, 16 Law Rep. 49. An appeal was taken to the Supreme Court of the United States, but was not prosecuted. 16 Law Rep. 178.

<sup>2</sup> *The Cynosure, supra.*

<sup>3</sup> A seaman shipping in a foreign port is not required by statute to sign articles. *Gladding v. Constant*, 1 Sprague, 73. A whaling voyage is not a foreign voyage within this act. *The Atlantic*, Abbott, Adm. 474; *Montgomery v. Tyson*, U. S. D. C. Mass. *Lowell, J.* See also *Taber v. United States*, 1 Story, C. C. 1.

<sup>4</sup> One suit should be brought for each penalty, and one count is sufficient. *Wolverton v. Lacey*, U. S. D. C. Ohio, 18 Law Rep. 672.

for which such seaman or mariner shall be shipped.”<sup>1</sup> The courts interfere to protect a seaman against loose and indefinite language, or unfair or new and unusual stipulations;<sup>2</sup> and wherever there is a doubt as to their meaning or obligation, the seaman has the benefit of the doubt.<sup>3</sup> And a new clause in the shipping articles,

<sup>1</sup> Act of July 20, 1790, c. 29, 1 U. S. Stats. at Large, 131. A general coasting and trading voyage, in which the vessel is trading at different ports, is within this act. *The Crusader*, Ware, 437. And it extends also to the lakes, and public navigable waters connecting the same. *Wolverton v. Lacey*, U. S. D. C. Ohio, 18 Law Rep. 672. The sixth section of the above act provides that the master shall produce the contract and log-book when required, otherwise parol evidence of their contents may be given. The first section of the Act of 1840, 5 U. S. Stats. at Large, 394, has been considered to imply that the owner must deposit the original articles with the collector of the port where the contract is made, and it has been suggested that this so far modifies the former act, that the master or owner, if not relieved from producing them at the call of the seaman, because, being in the custom-house, they are as much at the command of the seaman as of the owner, yet at least the seaman should give distinct and reasonable notice that he desires them. *The Brig Osceola*, Olcott, Adm. 450, 459. This case also decides that, in the absence of the shipping articles, the statement of the mariner in the libel is only evidence of what the master is obliged to put in the articles, namely, “a declaration of the voyage or voyages, term or terms of time, for which the seaman or mariner shall be shipped.” And also, that if the owners prove a reasonable excuse for not producing the articles, they may contradict by parol the statement of their contents by the mariner. See *Piehl v. Balchen*, Olcott, Adm. 24. The shipping articles are admissible as evidence of the terms of hire in an action brought by the master or his administrator against the owners, as well as in suits between the seamen and owners. *Willard v. Dorr*, 3 Mason, 161.

<sup>2</sup> The leading cases on this point are *The Juliana*, 2 Dods. 504; *Harden v. Gordon*, 2 Mason, 541; *Brown v. Lull*, 2 Sumner, 443; *Matern v. Gibbs*, 1 Sprague, 158. In *The Sch. Highlander*, 1 Sprague, 510, *Sprague, J.*, said: “Whenever an unusual clause is introduced into the shipping articles, impairing the rights of seamen, or imposing any additional duties or obligations on them, two conditions are required: 1st. That the seaman had the agreement so explained to him that he fully understood the meaning; and 2d. That a reasonable compensation was given him for the renunciation of the right, or for the new obligation assumed.” See also *Heard v. Rogers*, 1 Sprague, 556; *Mayshew v. Terry*, 1 Sprague, 584.

<sup>3</sup> See *the Minerva*, 1 Hagg. Adm. 347, 355; *The Hoghton*, 3 Hagg. Adm. 100, 112; *Jansen v. The Heinrich*, Crabbe, 226; *Wope v. Hemenway*, 1 Sprague, 300. In *The Lanarkshire*, 2 Spinks, Adm. 192, *Dr. Lushington* said: “In case of doubt, as the owners are much more competent to take care that the articles are clearly expressed than the mariners, I should be disposed to lean against a construction, the result of which would be to convict the seamen of desertion.”

which is relied on to repel a claim for wages, should be specially pleaded.<sup>1</sup> An agreement made under duress is not binding.<sup>2</sup> If a voyage from one place to another is stated, and the words "and elsewhere" are added, these mean nothing, or only such further procedure by the vessel as fairly belongs to the voyage described; and this the law would permit without them.<sup>3</sup> But a definite

<sup>1</sup> *Heard v. Rogers*, 1 Sprague, 556.

<sup>2</sup> *Mayshew v. Terry*, 1 Sprague, 584, and if the articles are signed under duress and protest, they are invalid. *Stratton v. Babbage*, U. S. D. C. Mass. 18 Law Rep. 94.

<sup>3</sup> *Brown v. Jones*, 2 Gallis. 477. In an early case before Mr. Justice *Winchester*, Anonymous, 1 Hall Am. Law Journal, 209, the shipping articles were for a voyage from Baltimore to Curacao, and *elsewhere*. It was held that this did not authorize a voyage from Baltimore to St. Domingo, and that the words "and elsewhere" must be construed either as void for uncertainty, since they did not contain any proper description of the terminus *a quo* and *ad quem*, as required by the act of Congress, or as subordinate to the principal voyage stated, and authorizing the ship in the progress of the voyage to pursue such course as might be necessary to accomplish the principal voyage, and this would be no more than was implied by the law itself. And in *Ely v. Peck*, 7 Conn. 239, a description of a voyage from New London to Oporto and elsewhere, was held to mean a voyage from New London to Oporto; and the words "and elsewhere" were rejected for uncertainty. See also *Gifford v. Kollock*, U. S. D. C. Mass. 19 Law Rep. 21; *The Countess of Harcourt*, 1 Hagg. Adm. 248; *The Eliza*, id. 182, 185; *The Minerva*, id. 347, 354; *The George Home*, id. 370, 374. In this last case it was decided that under an engagement to go "from London to Batavia in the East India seas, or elsewhere, and until the final arrival at any port or ports in Europe," the seamen were not bound, upon the arrival of the vessel at Cowes for orders, according to previous agreement between the owners and the master, to proceed on a further voyage to Rotterdam. See also *The Westmorland*, 1 W. Rob. 216, 225; *Roberts v. Knights*, 7 Allen, 449; *Piehl v. Balchen, Olcott*, Adm. 24. In *Douglass v. Eyre*, Gilpin, 147, it was held that the description of a voyage from Philadelphia to Gibraltar, other ports in Europe or South America, and back to Philadelphia, authorized a voyage from Gibraltar to South America, direct. Judge *Hopkinson* was also of the opinion, in the case of *Magee v. The Moss*, Gilpin, 219, that a voyage from Philadelphia to Buenos Ayres, thence to Havana, thence to Marseilles, thence to a port in South America, and thence back to Philadelphia, came within the description of a voyage "from Philadelphia to South America, or any other port or ports, backwards and forwards, when and where required, and back to Philadelphia." This proceeds upon the ground that, although the description be too broad to satisfy the act of Congress, yet if the master does under it only what the court thinks reasonable, the seaman cannot leave the ship. This construction is opposed by Judge *Ware*, in the case of *The Crusader*, Ware, 437.

And it is now provided, by the Act of July 20, 1840, ch. 48, § 10, 5 U. S. Stats.

usage may give a precise meaning to these words.<sup>1</sup> And the shipping articles ought to declare explicitly the ports of the beginning

at Large, 395, that all shipments of seamen contrary to the provisions of acts of Congress shall be void. Accordingly it has been held that a description of a voyage "from the port of Boston to Valparaiso, and other ports in the Pacific Ocean, at and from thence home, direct, or via ports in the East Indies or Europe," was not a compliance with the Act of 1790. *Wope v. Hemenway*, 1 Sprague, 300, affirmed, *Snow v. Wope*, 2 Curtis, C. C. 301. Mr. Justice Curtis said: "It is manifest that no definite and specific voyage, nor even any limited number of voyages, is here described; but liberty exists to carry on any number of voyages, during such time as the vessel may last, at the discretion of the master, provided that the first port to which the vessel goes is Valparaiso, and her ultimate port of destination is Boston. These are the only fixed termini, and between them there are no limits of time, and scarcely any of space. If this is a sufficient description to satisfy the requirement of the act, it is an idle requirement, and affords no protection to the seaman." As to the meaning of the word "cruise" in the shipping articles, see *The Brutus*, 2 Gallis. 526. A trading voyage does not include a freighting voyage. *Brown v. Jones*, 2 Gallis. 477. Nor does a whaling voyage include a trading voyage to dispose of the cargo after it is obtained. *Gifford v. Kollock*, 19 Law Rep. 21. In *the United States v. Staly*, 1 Woodb. & M. 338, a voyage from the home port to Apalachicola, or elsewhere, for a market, was held to be sufficiently described in the shipping articles to be binding. In *The Gem*, U. S. D. C. Mass., *Lowell, J.*, the voyage was described as from Salem, Massachusetts, to Goree and a market, and back to a final port of discharge in the United States. The vessel went to Goree and several other ports on the west coast of Africa, disposed of her outward cargo, took passengers to one of the Cape de Verd Islands, and was about to proceed to a third to get a cargo of salt with which to return to the coast of Africa and there by trade or barter obtain a homeward cargo, when the libellant left. The case was decided against the vessel, on the ground that the contract was broken by the deviation. Doubts were also expressed as to the sufficiency of the description in the articles. Speaking of the case of *United States v. Staly*, *supra*, the judge said: "This ruling was probably made without the benefit of much discussion, and the brief statement of reasons is certainly not satisfactory." In *Burke v. Buttman*, U. S. D. C. Mass., *Lowell, J.*, the voyage was described to be from Boston to Goree, Africa, at and from thence to such port or ports as the master may direct. It was held that the master and owners could not take advantage of the defects in these articles, and discharge the seamen wherever they pleased, and that the seamen had the right to come home in the vessel in which they sailed, and that the master had no right to transfer them to any other vessel or to discharge them in a foreign country. In *Stratton v. Babbage*, U. S. D. C. Mass. 18

<sup>1</sup> Thus the same objection does not apply to the use of the word "elsewhere" in a whaling, as in a trading or freighting voyage. But even in such a case there must be a terminus to the voyage specified. *Gifford v. Kollock*, 19 Law Rep. 21. See also *Brown v. Jones*, 2 Gallis. 477.

and of the termination of the voyage.<sup>1</sup> If a number of ports are named, they must be visited in their geographical, or rather commercial order, or as they stand in the articles, without returning to any which have been visited.<sup>2</sup> But if the shipping articles contain expressions not obviously oppressive, indicating distinctly that the master is to have a discretion in these matters, the courts will

Law Rep. 94, the question arose as to the meaning of "a port of discharge in the United States." It was held that a port in the slave States, where colored seamen are obliged to remain in jail, or on board the vessel while she remains in port, is not a port of discharge for them, and that in such a case they are entitled to wages at the original rate until they are brought to another port. But if they desire to be left at such a port, it has been held that the master has no right to take them away. *The Ship William Jarvis*, 1 Sprague, 485. In *The Varuna*, Vice Adm. Ct., Lower Canada, 18 Law Rep. 437, the voyage was "from the port of Liverpool to Constantinople, thence (if required) to any ports or places in the Mediterranean or Black seas, or wherever freight may offer, with liberty to call at a port for orders, and until her return to a final port of discharge in the United Kingdom, or for a term not to exceed twelve months." The ship went to Constantinople, and then returned to Malta, and thence sailed direct to Quebec in search of freight. The court held that the voyage to Quebec was not justified by the articles, because the words "wherever freight may offer" should be construed with reference to the previous description of the voyage, and must be considered as meaning any ports or places in the two seas mentioned in the articles, or some place in their immediate neighborhood, or between them and the United Kingdom. And in *Peterson v. Gibson*, Superior Ct., Suffolk Co. Mass. 20 Law Rep. 380, the description "a voyage from Liverpool to Havana, thence (if required) to any ports or places in the West Indies, or wherever freight may offer, and back to a final port of discharge in the United Kingdom, or for a term not exceeding twelve months," was held not to cover a voyage from the West Indies to Boston and back during the period. The following has been held to be a sufficient description: "From Boston to one or more ports south, thence to one or more ports in Europe, and back to a port of discharge in the United States." *Thompson v. Ship Oakland*, U. S. D. C. Mass., 4 Law Rep. 349. Where the voyage was described in the shipping articles to be to a "final port of discharge," it was held that the voyage was not ended until the cargo was wholly unladen, and that the owner might order the vessel from port to port till that was done. *United States v. Barker*, 5 Mason, 404. But if the vessel is at a port in the country specified for the port of final discharge, after performing part of the voyage, and she has no cargo to be discharged, but is seeking business, she is considered at her port of final discharge. *The Ship Wm. Jarvis*, 1 Sprague, 485.

<sup>1</sup> Anonymous, 1 Hall Am. Law Journal, 209; *The Crusader*, Ware, 437; *Magee v. The Moss*, Gilpin, 219, 226; *Gifford v. Kollock*, 19 Law Rep. 21.

<sup>2</sup> *Douglass v. Eyre*, Gilpin, 147; *Brown v. Jones*, 2 Gallis. 477, 480.

not interfere.<sup>1</sup> If the articles describe certain ports, and are also limited in time, both restrictions are operative, and the seamen are not bound for the time, unless the vessel goes to the ports in the order described, within the time specified.<sup>2</sup>

So as to other stipulations, they will be sustained or rejected, as they seem to be fair or otherwise.<sup>3</sup> Any stipulation contravening

<sup>1</sup> *Wood v. The Nimrod*, Gilpin, 83. But see *The Brookline*, 1 Sprague, 104.

<sup>2</sup> *The Ship Wm. Jarvis*, 1 Sprague, 485. See *The Lanarkshire*, 2 Spinks, Adm. 189.

<sup>3</sup> *The Minerva*, 1 Hagg. Adm. 347, 355; *Harden v. Gordon*, 2 Mason, 541, 555; *Brown v. Lull*, 2 Sumner, 443; *The Sarah Jane*, 1 Blatchf. & H. Adm. 401, 406; *The Brig Cadmus v. Matthews*, 2 Paine, C. C. 229; *The Quintero*, U. S. D. C. Mass., *Lowell*, J., January, 1866. In *The Prince Frederick*, 2 Hagg. Adm. 394, the articles contained a clause that if contraband goods should be found in the fore-castle, the seamen living therein should forfeit their wages and £ 10 besides. Held, that the penalty of £ 10 could not be enforced at all in a court of admiralty, and that only those seamen forfeited their wages who were proved to be directly implicated in the offence. In *Harden v. Gordon*, 2 Mason, 541, 555, the following stipulation was set aside as grossly inequitable: "We further agree and bind ourselves to pay for all medicines and medical aid, further than the medicine chest affords." See also *Freeman v. Baker*, 1 Blatchf. & H. Adm. 384. So a stipulation that the seamen will sue for wages in courts of common law only, is void, unless it be proved that the matter was clearly explained to them before they entered into the agreement; and their rights will be in no way prejudiced by such a change. *The Sarah Jane*, 1 Blatchf. & H. Adm. 401. It was also held, in this case, that under a stipulation that all *differences* between the master or owners and crew, shall be referred to arbitration, where wages due were demanded, but payment refused, there was no *difference* within the meaning of the stipulation. In *Brown v. Lull*, *supra*, Mr. Justice Story said: "Courts of admiralty are not, by their constitution and jurisdiction, confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity. Whenever, therefore, any stipulation is found in the shipping articles which derogates from the general rights and privileges of seamen, courts of admiralty hold it void, as founded on imposition or an undue advantage taken of their necessities and ignorance and improvidence, unless two things concur; first, that the nature and operation of the clause is fully and fairly explained to the seamen; and, secondly, that an additional compensation is allowed, entirely adequate to the new restrictions and risks imposed upon them thereby." In *Neave v. Pratt*, 5 B. & P. 408, the articles contained a clause that the seamen might leave the ship at the end of three months, if the ship was in port or in perfect safety, of which the captain was to be the sole judge. Held, that even if this proviso were not void, yet the captain could not refuse without reason, of which the jury were to judge. And in *The Atlantic*, Abbott, Adm. 451, a stipulation in the articles for a whaling voyage, that if either of the officers or crew

the language or the policy of a statute, is of course void.<sup>1</sup> Not unfrequently clauses are introduced lessening the rights of the seamen to their wages, or the like; and though common law courts allow some force to these,<sup>2</sup> admiralty courts never do;<sup>3</sup> nor

should be prevented by sickness or any other cause from performing their duty during the whole of the voyage, he should receive of his lay in proportion as the time served or duty performed by him should be to the whole time of the voyage, was held valid. In *Hazard v. Howland*, 2 Sprague, 68, the shipping articles contained the following clause: "No distilled spirituous liquors will be put on board this vessel by the owner, except for strictly medicinal use; and by their signatures the other parties to this contract pledge themselves not to take any of these articles with them as their private stores, or for traffic, either from this port or any other port or place where they may be during the voyage. And in case of a violation of this pledge by the master, or any officer or seaman, his entire share of the voyage shall be thereupon forfeited to the use of the owners." Judge *Sprague* said: "The articles prescribe a forfeiture of the wages for the whole voyage. But I shall treat this as forfeitures are generally treated,—they are to be cut down to a just amount under all the circumstances. I cannot suppose, indeed, that it was really intended that a total forfeiture should be made as prescribed. Some voyages are four or five years in length; then if any seaman should, after four years of faithful service, bring on board, when liberty was given on shore, a single bottle of liquor, he would, by the terms of this provision, forfeit his whole voyage. It cannot be supposed that such an injustice was intended by the owners. I have, therefore, no hesitation in saying that the court are not called on rigidly to inflict the whole of this forfeiture." In this case the master had liquors on board, and drank frequently. There was no evidence that any particular damage was done, but the court held that it was not a case for mere nominal damages, and assessed three hundred and seventy-five dollars as the damages.

<sup>1</sup> *Harden v. Gordon*, 2 Mason, 541.

<sup>2</sup> *Cutter v. Powell*, 6 T. R. 320; *Appleby v. Dods*, 8 East, 300; *Jesse v. Roy*, 4 Tyrw. 626, 1 Crompt. M. & R. 316. In this case Lord *Lyndhurst*, C. B., said: "I know no principle by which a contract entered into by mariners is to be construed differently from those made among other persons." See also *Rice v. Haylett*, 3 Car. & P. 534; *Webb v. Duckingfield*, 13 Johns. 390; *Dunn v. Comstock*, 2 E. D. Smith, 142, and cases in next note.

<sup>3</sup> In *The Juliana*, 2 Dods. 504, it was held, that in a divided voyage, where, by the general law, the seamen are entitled to their wages up to the last port of delivery, a stipulation in the articles that they should not be entitled to any part of their wages in case of the loss of the vessel before her arrival at the final port of discharge, was void. See also *Buck v. Rawlinson*, 1 Bro. P. C. 137; *Edwards v. Child*, 2 Vern. 727. So in *Johnson v. Sims*, 1 Pet. Adm. 215, where the agreement was as follows: "No officer or seaman belonging to the said ship shall demand or be entitled to his wages, or any part thereof, until the arrival of the said ship at the port of discharge in Philadelphia." This was held to mean merely that the wages for the outward voyage should be paid only in Philadelphia; and

do they give any effect to the receipt of a sailor for his wages, whether sealed or parol, unless there was an actual payment of them.<sup>1</sup> So if a seaman is induced to assent to his discharge upon payment of a nominal sum, from just apprehension of future ill treatment arising from the misconduct of the master, such assent is given under a species of duress, and is no bar to a recovery of the amount actually due to him at the time of his discharge.<sup>2</sup> And a custom of a particular port, that seamen's advance wages, due under shipping articles, shall be paid to the shipping agent, to be paid by him to the boarding-house keeper bringing the seamen, for their benefit, is unreasonable, and does not bind the seamen, although known to them at the time of signing the articles.<sup>3</sup>

that if the vessel was lost or captured, the wages due should be paid after the ordinary time for her arrival had elapsed. See also *Millot v. Lovett*, Sup. Jud. Ct., Mass. 2 Dane, Abr. 461; *Swift v. Clark*, 15 Mass. 178. In the case of *Goodridge v. Peabody*, before the same court, 2 Dane, Abr. 462, the special agreement was fully explained to the seaman before he signed, and the case was, therefore, decided differently from those above cited. In *Brown v. Lull*, 2 Sumner, 443, the following stipulation was held to be void: "In case of the said vessel being taken or lost in the course of the said voyage, no wages shall be demanded or received by the persons subscribing the same, except the advance wages received by them respectively at the time of entry on board; and that, if the said vessel should be restrained for more than thirty days at any one time, the wages should cease during such restraint and no longer." So in *The Cypress*, 1 Blatchf. & H. Adm. 83, it was held that a stipulation was void which provided that the seamen should not, in any case, demand their wages until the expiration of twelve months, if the voyage was completed, or the men discharged before that time. But a stipulation that the seamen shall not sue for wages, until the vessel is unladen, is binding, if fairly made. - *Granon v. Hartsborne*, 1 Blatchf. & H. Adm. 454. So a clause, usual in the Baltic trade, that the officers and seamen agree to accept half wages in case of the vessel wintering abroad, is valid. *The Houghton*, 3 Hagg. Adm. 100.

<sup>1</sup> *Thorne v. White*, 1 Pet. Adm. 178; *Jackson v. White*, id. 179; *Whiteman v. The Neptune*, id. 180, 182; *The David Pratt*, Ware, 495; *The Harriet*, 1 Sprague, 33; *Harden v. Gordon*, 2 Mason, 541; *Thomas v. Lane*, 2 Sumner, 1, 11; *Piehl v. Balchen*, Olcott, Adm. 24. And in *Whitney v. Eager*, Crabbe, 422, a release of all complaints against the officers of the vessel, which the seaman had to sign in order to get his wages, was held to be void. See also *The Commerce*, 1 Sprague, 34; *The Mary Paulina*, 1 Sprague, 45; *Payne v. Allen*, 1 Sprague, 304. But the evidence to control a receipt in full for wages must be clear and explicit. *Leak v. Isaacson*, Abbott, Adm. 41.

<sup>2</sup> *Bates v. Seabury*, 1 Sprague, 433.

<sup>3</sup> *Metcalf v. Weld*, 14 Gray, 210.



If the shipping articles be sealed by the mariners but not by the master, *assumpsit* lies on them by the seamen, at common law.<sup>1</sup> In admiralty, seals have no effect.<sup>2</sup> The stipulation in the shipping articles is conclusive as to wages;<sup>3</sup> and no more can be re-

<sup>1</sup> This is in accordance with the head-note in *Sutherland v. Lishman*, 3 Esp. 42, but it does not appear certainly what point the case decided. The action was *assumpsit* for wages. In defence it was shown that the ship's articles were under seal, that they were signed by the plaintiff but not by the defendant, and it was contended that, the articles being under seal, the action ought to have been covenant. The report then adds: "Lord Eldon ruled, that the binding by deed ought to be mutual to make it necessary for the plaintiff to sue in covenant; that the defendant never having sealed, the articles could not be sued in that form of action, and that the present action was not rightly brought. The defendant had a verdict." To make this language consistent, either the word "not," in the phrase "*not* rightly brought," must be struck out, and the word "plaintiff" be substituted for "defendant" in the last sentence, or we must suppose that, owing to some facts not mentioned, *assumpsit* would not lie.

<sup>2</sup> The *David Pratt*, Ware, 495.

<sup>3</sup> *White v. Wilson*, 2 B. & P. 116; *Elsworth v. Woolmore*, 5 Esp. 84; *The Isabella*, 2 Rob. Adm. 241; *Veacock v. McCall*, Gilpin, 329. But see *Parker v. The Ship Calliope*, 2 Pet. Adm. 272; *Page v. Sheffield*, 2 Curtis, C. C. 377. In *Carter v. Hall*, 2 Stark. 361, it was held that a purser's steward, who receives a specific salary from the crown, cannot recover wages from the purser on an implied contract for his services on board the ship. See also *Dafer v. Cresswell*, 7 Dowl. & R. 659. But in *Clutterbuck v. Coffin*, 4 Scott, N. R. 509, it was held that the plaintiff having, at the request of the defendant, a captain in the navy, entered on board his ship as cook, on condition that he should be paid wages over and above the government pay, he might recover from the defendant. If a cook performs services out of the line of his employment, as where he acts as caulker, he may recover additional compensation. *The Exchange*, 1 Blatchf. & H. Adm. 366. And the same rule applies where the captain paints his ship himself. *String v. Hill*, Crabbe, 454. But the master is entitled to call on the cook to do seaman's work, when the vessel is in port. *Allen v. Hallett*, Abbott, Adm. 573. In the case of *The Brookline*, 1 Sprague, 104, the crew were shipped on a voyage "to a port or ports easterly of the Cape of Good Hope, or any other port or ports to which the master should see fit to go in order to procure a cargo." The owners intended to go to Ichaboe for a cargo of guano. This was concealed from the seamen. The seamen refused to work at loading the guano, and the master finally agreed to pay them a certain sum over and above their wages, for every ton they should load. The court held that the seamen were not bound to work for their ordinary wages, because fraud had been practised upon them to get them there, and that they might recover compensation in addition to the sum agreed upon at the island. If mariners are shipped during a war, but while on the voyage peace ensues, their wages are not diminished. *McCulloch v. The Lethe*, Bee, Adm. 423; *Shaw v. The Lethe*, id. 424. But if the ship do not

covered on any special promise to pay for severe or extra labor or exposure in the course of duty.<sup>1</sup> If, however, a seaman be promoted, he takes the wages of his new office.<sup>2</sup> But it seems that if he be afterwards degraded for incapacity, he cannot recover his

enter upon the high seas, the scene of danger, until after peace is declared, the wages will be decreased, after the time of such declaration. *Brice v. The Nancy, Bee*, Adm. 429.

<sup>1</sup> *Harris v. Watson, Peake*, Cas. 72. So, where some of the crew deserted, and the captain could not obtain any men to fill their places, a promise by him to divide the wages of those who had deserted among the crew remaining, was held to be void. *Silk v. Myrick*, 2 Camp. 317; *Harris v. Carter*, 3 Ellis & B. 559, 25 Eng. L. & Eq. 220. And in a case where the master had distributed the wages of the deserters among the rest of the crew, it was held that, in an action by the crew for wages, the owners could retain a sum equal to the amount so paid over. *Dr. Lushington*, however, said that he did not wish it to be inferred that seamen, when the outward voyage is completed, are bound to make the return voyage, when the number of the crew is so small that risk of life may be incurred. *The Araminta*, 1 Spinks, Adm. 224, 29 Eng. L. & Eq. 582. And if the vessel becomes so short-handed at an intermediate port as to be unseaworthy, a note voluntarily given by the captain to a seaman to secure an extra remuneration, in consideration of the seaman's assisting to carry on the ship, is valid. *Hartley v. Ponsonby*, 7 Ellis & B. 872. In *Thompson v. Havelock*, 1 Camp. 527, the plaintiff, who was captain of a vessel, let her to the government for a fixed price, and also stipulated that he should be paid, in consideration of the extra services he would be obliged to perform, one shilling per ton per month. The government paid this over to the owner, and in an action against him by the captain it was held that the latter could not recover it. A promise of higher wages made to seamen threatening to desert, is void. *Bartlett v. Wyman*, 14 Johns. 260. See also *Johnson v. Dalton*, 1 Cow. 543. In *Frazer v. Hatton*, 2 C. B. n. s. 512, 40 Eng. L. & Eq. 318, the plaintiff signed shipping articles, by which he agreed to serve as steward on a certain voyage at the rate of £3 per month. The articles also provided that "the crew, if required, might be transferred to any other ship in the same employ." It was held, under this provision, that any member of the crew might be transferred without the rest, and that articles signed by the captain stipulating for higher wages for the plaintiff, he having been transferred, were null and void. In *Mesner v. The Suffolk Bank*, 1 Law Rep. 249, it was held, where a steamboat came into collision with a sailing vessel, and was in imminent danger of sinking, that a promise of a reward by a passenger to the officers or crew, to secure their exertions in saving his property, was not binding.

But if the ship is captured, and the captain, to induce one of the crew to become a hostage, promises to pay him wages, at the same rate as before the capture, as long as he shall remain a hostage, such promise is binding on the owners. *Yates v. Hall*, 1 T. R. 73.

<sup>2</sup> *The Providence*, 1 Hagg. Adm. 391; *The Gondolier*, 3 Hagg. Adm. 190; *Hicks v. Walker*, Exch. 1856, 37 Eng. L. & Eq. 542.

advanced wages during the period of his advancement, but only wages as a seaman.<sup>1</sup>

If the mate succeeds to the command of the vessel on the death of the captain, he becomes entitled to extra wages;<sup>2</sup> but a question has arisen whether he can sue *in rem* for his services as master. In England it is settled that he cannot, and such appears to be the law in this country.<sup>3</sup>

Accidental omissions in the shipping articles may be supplied by parol; and if seamen sail without any shipping articles, they are then entitled to the highest rate of wages paid at the place at which they ship, within the preceding three months, for the same voyage.<sup>4</sup> All interlineations, erasures, or alterations are presumed

<sup>1</sup> Wood v. The Nimrod, Gilpin, 83.

<sup>2</sup> Smith v. Curtis, 5 Allen, 367.

<sup>3</sup> Read v. Chapman, 2 Strange, 937; The Favourite, 2 Rob. Adm. 232. The case of The Brig George, 1 Sumner, 151, has been supposed to advance a contrary doctrine. The action was *in rem* by the mate to recover his wages. The claim was admitted, but the owners sought to set off a claim for money expended on account of his sickness, after he had become master. It does not appear that the increased wages due him as master were included in his demand, and the only point in controversy was as to the validity of the set-off. The English authorities have been followed by Judge Betts in the case of The Schooner Leonidas, Olcott, Adm. 12. See also Airey v. The Brig Ann C. Pratt, 1 Curtis, C. C. 395, 398.

<sup>4</sup> Stat. 1790, c. 29, § 1, 1 U. S. Stats. at Large, 131; Stat. 1840, c. 48, § 10, 5 U. S. Stats. at Large, 394. The former of these acts has been held not to be applicable to a seaman on board a tug-boat which ran from the mouth of the River Detroit to Port Huron. Milligan v. Propeller B. F. Bruce, 1 Newb. Adm. 539. In England, if the articles are signed and the rate of wages omitted, parol evidence of the rate agreed on is admissible. The Porcupine, 1 Hagg. Adm. 378; The Harvey, 2 Hagg. Adm. 79; The Prince George, 5 Hagg. Adm. 376. The same rule has been adopted in this country. Wickham v. Blight, Gilpin, 452; The Warrington, 1 Blatchf. & H. Adm. 335. It seems to have been supposed by Judge Betts, that the highest rate of wages payable within the three months previous might be recovered in such a case. But the statute of 1790 applies only when the master neglects to insert in the contract the voyage and the length of time, and does not apply to the omission to insert the rate of wages. Under the statute of 1790, Mr. Justice Peters, in the case of Jameson v. The Ship Regulus, 1 Pet. Adm. 212, stated that he had been of the opinion that if there was a verbal agreement for wages, this superseded the law, and was to be taken as the contract. Mr. Justice Story, in a note to Abbott on Shipping, 607, said: "No case is referred to where such a decision had been made; and before it could be made, it would require very grave consideration, how far such a verbal agreement, in contravention of the statute, should be admitted to supersede the

to be fraudulent, unless satisfactorily explained.<sup>1</sup> It may be added, that the usual rules of evidence and of construction apply to the shipping articles;<sup>2</sup> but a seaman may show by parol that written statements were made to induce him to sign,<sup>3</sup> as that the voyage or time of service represented was not that which is on the paper;<sup>4</sup> or that the articles have been altered since they were

positive direction of the statute as to the highest wages." In *The Crusader*, Ware, 437, parol evidence was held inadmissible to prove that a lower rate of wages or a different mode of compensation was agreed on. The Act of 1840 has enlarged that of 1790 to some extent. The tenth section provides that "all shipments of seamen made contrary to the provisions of this and other acts of Congress, shall be void; and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment." The Act of 1790 does not exempt the seaman from penalties and forfeitures incurred under the maritime laws pre-existent to that act. *Jameson v. The Ship Regulus*, 1 Pet. Adm. 212. If a seaman ship without signing the articles, an implied contract is presumed, by which he is bound to remain with the ship till the voyage is terminated. *Jansen v. The Heinrich*, Crabbe, 226. In *Montgomery v. Tyson*, U. S. D. C. Mass., *Lovell, J.*, it was contended that as the copy of the articles produced did not contain the length of time the whaling voyage was to last, they were void. It was proved that the usage in the Greenland fishery was to stipulate for a term not exceeding thirty months, that it was so understood in this case, and that the copy of the articles certified by the collector, which was taken in the ship, was so written out. How the discrepancy occurred was not shown, but there being no reason to suspect fraud on the part of any one, parol evidence was admitted to supply the defect.

<sup>1</sup> Stat. 1840, c. 48, § 4, 5 U. S. Stats. at Large, 395. In the case of *The Sch. Eagle*, Olcott, Adm. 232, it was held, that this applied only to such alterations as would vary the effect of the shipping articles in regard to seamen, and not to immaterial erasures.

<sup>2</sup> But a court of admiralty will construe the articles liberally. Mr. Justice Story, in the case of *The Brutus*, 2 Gallis. 526, 537, said, speaking of shipping articles: "These, like all other mercantile instruments, are drawn up in a very lax and inartificial manner. To construe the language by the technical rules of literal interpretation would be to defeat the manifest intention of the parties. We are, therefore, bound to construe it with great liberality, and to look to the general scope and object of the instrument, rather than to weigh minutely the force of detached expressions."

<sup>3</sup> *Baker v. Corey*, 19 Pick. 496; *The Enterprise*, 2 Curtis, C. C. 317, 320.

<sup>4</sup> In *The Cypress*, 1 Blatchf. & H. Adm. 83, twelve months was the time of service mentioned in the articles. Held, that it could be shown by parol that nine was the time agreed upon. The question, in regard to the admissibility of parol evidence to change the voyage described in the shipping articles, was elaborately

subscribed.<sup>1</sup> In the United States the shipping articles for a fishing voyage are required to be indorsed or countersigned by the owners, but the seaman is not restricted to those who sign, in an action for his wages, but may show *aliunde* who are the actual

discussed in the case of *Page v. Sheffield*, 2 Curt. C. C. 377. The action was for wages alleged to be due on a voyage from San Francisco to Calcutta, and thence to Boston. The libellant was discharged against his will at Calcutta. In the articles the voyage was described to be from San Francisco to Calcutta. Evidence was offered to prove that the libellant shipped for the whole voyage from San Francisco to Boston. Mr. Justice *Curtis* held, that it was admissible on two grounds. First, that the voyages from San Francisco to Calcutta, and from the latter place to Boston, might be considered as distinct, and the articles for the first not being intended to include the second, the latter might be proved by parol. Second, if the contract was entire, then the articles did not describe the voyage, and the master was, therefore, prohibited from taking the libellant to sea under such articles; and parol evidence is always admissible to impeach a contract, by showing it to be made in violation of law. See also the same case in the District Court, *Sheffield v. Page*, 1 Sprague, 285. But the ship-owner cannot vary the voyage by parol evidence. *The Triton*, 1 Blatchf. & H. Adm. 282; *The Exchange*, id. 366. In *Burke v. Buttman*, U. S. D. C. Mass., *Lowell, J.*, said: "It will be seen that my opinion does not turn upon the oral evidence at all. It was admitted in favor of the seamen because the circuit court has held that it is admissible for them; a ruling which I consider is open to some question. It was admitted for the owners merely in rebuttal. It is a dangerous sort of evidence, and one on which I am always reluctant to decide a case. It must not be supposed that if it were fully and clearly established by such evidence that the seamen were to be discharged in Africa, that the master would be entitled to discharge them there. The rule of evidence, like the contract itself, is established for the benefit of the ignorant and careless seamen, and for seamen only. Masters and owners have ample protection in the contract itself, which, if properly drawn up and clearly explained to the men, will be conclusive. These articles do not fully and fairly warn the men of the rights which the master undertook to exercise. It is upon this that the case is decided."

<sup>1</sup> See p. 45, note 1. The general rule in regard to parol evidence is stated in *Willard v. Dorr*, 3 Mason, 161, 169. Mr. Justice *Story* there said: "But *prima facie* the shipping articles are presumed to import verity, and to be as well known to the owner as master; and it is incumbent on the owner, if he means to contest the fact, to offer some evidence of fraud, mistake, or interpolation." If there is a stipulation in writing for a series of voyages, this may be terminated or varied by the mutual consent of the master and crew, and a new voyage substituted by a parol agreement. *Piehl v. Balchen*, Olcott, Adm. 24. In *The Trial*, 1 Blatchf. & H. Adm. 94, it was held that in a suit for wages, if the owners do not produce the shipping articles, even though they are not called upon to do so, parol evidence of the terms of hiring may be given. But see *The Brig Osceola*, Olcott, Adm. 450.

owners.<sup>1</sup> The master of a vessel has no power to bind the owner to pay a seaman three months' wages after the voyage has terminated and all services on his part have ceased, but if a seaman is hired in a foreign country, the master may bind the owners to pay him such sum as will enable him to return.<sup>2</sup>

### SECTION III.

#### OF WAGES.

The contract between a seaman and the owner of the ship, or the master as his agent, is essentially a contract of hiring and service. All that is implied in such contracts by the law generally belongs to their contract;<sup>3</sup> as, on the one hand, the doing the work faithfully, obeying all proper orders and directions, and possessing and exerting the knowledge, skill, and care requisite for doing in a proper way the service undertaken; and, on the other, good treatment, and due payment. All of these are somewhat modified by the peculiar nature of this contract or relation, and by the statutes to which it has given rise. But so far as these modifications or qualifications do not apply specifically, we find the general principles of the law in force.

Seamen may be hired and payment promised in four ways. They may be employed for a certain voyage, to receive a certain proportion of the freight earned;<sup>4</sup> but we doubt whether this is ever practised in this country, unless, perhaps, in small coasting vessels. They may be hired for a certain voyage,<sup>5</sup> or by the run, to be paid a round sum at the close;<sup>6</sup> and this is not very un-

<sup>1</sup> *Wait v. Gibbs*, 4 Pick. 298. It would seem, however, that he could not bring an action on the shipping articles except against those whose names appeared on that instrument.

<sup>2</sup> *Canizares v. The Santissima Trinidad*, Bee, Adm. 353.

<sup>3</sup> *The Dawn*, Ware, 486, 494; *The Brig Osceola*, Olcott, Adm. 450, 461; *The Cadmus*, Blatchf. & H. Adm. 139; *Brig Cadmus v. Matthews*, 2 Paine, C. C. 229.

<sup>4</sup> *The Sarah Jane*, Blatchf. & H. Adm. 401; *Anonymous*, 1 Pet. Adm. 205, note.

<sup>5</sup> *The Debrechia*, 3 W. Rob. 33.

<sup>6</sup> *The Louisa Bertha*, 1 Eng. L. & Eq. 665; *Miller v. Kelly*, Abbott, Adm. 564.

usual. They may be hired on shares, which is in practice confined to whaling<sup>1</sup> and fishing voyages,<sup>2</sup> with some exception in

<sup>1</sup> *Barney v. Coffin*, 3 Pick. 115; *Bishop v. Shepherd*, 23 Pick. 492; *Coffin v. Jenkins*, 3 Story, 108; *Joy v. Allen*, 1 Sprague, 130, 2 Woodb. & M. 303; *Allen v. Hitch*, 2 Curtis, C. C. 147; *The Sarah Jane, Blatchf. & H. Adm.* 401; *Reed v. Hussey*, id. 525; *Swain v. Howland*, 1 Sprague, 424. The contract is one of hiring and not of partnership. *Wilkinson v. Frasier*, 4 Esp. 182; *Mair v. Glennie*, 4 M. & S. 240; *The Frederick*, 5 Rob. Adm. 8; *Baxter v. Rodman*, 3 Pick. 435; *Grozier v. Atwood*, 4 id. 234; *Bishop v. Shepherd*, 23 id. 492; *Reed v. Hussey, Blatchf. & H. Adm.* 525. In the above case of *Barney v. Coffin*, it was held that a usage that the master of a whaling ship should have a lien on the lays of the seamen for necessary clothing furnished during the voyage, was reasonable in its nature, and that the lien was not lost by putting the oil marked with the ship's mark on a wharf, whence part of it was taken by one of the owners of the vessel, but afterwards returned and delivered up to a general agent to be sold for the purpose of settling the voyage. In *The Hibernia*, 1 Sprague, 78, the owners claimed to charge the master's bills for slops furnished the men, without giving the items or any evidence of the same, on the ground that as the master had a lien upon the proceeds of the voyage for the slops, the owners must retain the nominal amount of the bills; but the court refused to allow the claim. In *Jay v. Almy*, 1 Woodb. & M. 262, it was held that the master of a whaling ship is not personally responsible for the wages of a seaman, when the vessel had been lost, and the cargo sent home. In *Hussey v. Fields*, 1 Sprague, 394, eight hundred barrels of oil had been sent home, and two thousand more taken when the ship put into a foreign port and was condemned and sold. The master settled with the men for their share on board, and gave them orders on the owners for their proportion of the eight hundred barrels. The other portion was handed over to the consul to be sent home, when it was illegally seized and sold. The owners claimed, that as the crew were only entitled to share the net profits of the voyage, the portion they had received should be debited to them as against the whole amount of oil realized by the voyage. But the court held that the captain, in making the disposition of the property, acted as the agent of the owners and not of the crew, and that the latter were entitled to their proportion of the eight hundred barrels. In *Montgomery v. Tyson*, U. S. D. C. Mass., *Lowell, J.*, the vessel had been wrecked, and part of the oil saved and sent home. The articles contained a clause giving the owners of the vessel a right to sell the oil and bone. It was contended that this was a waiver of the lien of the seamen, if they originally had any. The court said that where goods belonged to the owners of a vessel, a reasonable sum would be considered as freight, and that in a whaling voyage "it may almost be said that the cargo to the extent of the owners' shares represents freight exclusively, having been earned in a long cruise by the use of the vessel and her outfits." On the question of the waiver the court held that, until a sale was actually made, the lien remained, and that only the net proceeds were liable. See also *Reed v. Hussey*, 1 Blatchf. & H. Adm. 525. In *Jay v*

\* See *Wait v. Gibbs*, 4 Pick. 298; *Knight v. Parsons*, 1 Sprague, 279.

the case of coasting vessels.<sup>1</sup> But the fourth, which is by far the most common and well-established practice, is to hire them for a definite voyage or voyages, or sometimes for a definite period, on monthly wages.<sup>2</sup>

If a woman serves on board as a cook, or in any capacity, she is entitled to all the rights and is subject to all the disabilities of a seaman.<sup>3</sup>

It has been settled that where seamen ship on board a privateer, and before the cruise begins become disabled by sickness, and neither assist in making prizes actually or constructively, they are not entitled to any share in them.<sup>4</sup> The same rule would doubt-

Allen, 1 Sprague, 130, the vessel was wrecked, part of the oil shipped home by the master, and the rest sold by him and the proceeds fraudulently converted to his own use. Judge *Sprague* held that the master was the agent of the owners and not of the crew, and that the owners were liable as if the oil had actually come into their possession. In *Montgomery v. Tyson*, U. S. D. C. Mass., *Lowell*, J., said he should, until otherwise instructed by a superior court, adhere to the doctrine laid down by Judge *Sprague*, cited above, and added: "I am aware that some doubts were expressed upon this point by Mr. Justice *Woodbury*, in the same case, reported as *Joy v. Allen*, 2 Woodb. & M. 303, but it seems, on a careful examination of the judgment, that the decision did not turn upon this point, and I have reasons to believe that Judge *Sprague* did not consider the point as definitely settled against his opinion."

<sup>1</sup> The *Crusader*, Ware, 437, 441.

<sup>2</sup> The *Brig Cadmus v. Matthews*, 2 Paine, C. C. 229; The *Cadmus*, Blatchf. & H. Adm. 139. See also *The Steamboat Hudson*, Olcott, Adm. 396. It is sometimes important to determine whether the contract is for the entire voyage at so much per month, or for that rate so long as the party remains during the voyage. In *Taylor v. Laird*, 1 H. & N. 266, 38 Eng. L. & Eq. 281, the following letter was written to the plaintiff by the owner of the vessel: "I am willing to give you the command of the steamer destined for an exploring and trading voyage up the River Niger and its tributaries; your pay to be at the rate of £50 per month, commencing from the first of December, 1853, and a commission of twenty per cent on the net proceeds of the produce you may bring down." The plaintiff accepted the offer. Held, that this was not an entire contract for the whole voyage, but a contract which gave a cause of action for the salary as each month arose, and which, when once vested, was not subject to be lost or divested by the plaintiff's abandonment of the voyage.

<sup>3</sup> The *Jane & Matilda*, 1 Hagg. Adm. 187; *Wolverton v. Lacey*, U. S. D. C. Ohio, 18 Law Rep. 672; *Sage-man v. Sch. Brandywine*, 1 Newb. Adm. 5.

<sup>4</sup> *Ex parte Giddings*, 2 Gallis. 56. In this case the libellant went on shore before the cruise began, and by so doing voluntarily abandoned the enterprise. It was admitted that if he had left the ship after the cruise began, he would have had a right to his share of the adventure. And the court said that if a disability



less be applied to a suit for wages in an ordinary case of a merchant ship. For the settled rule appears to be, that if the voyage is broken up, or the seamen are dismissed without cause before the voyage begins, they have their wages for the time they serve, and a reasonable compensation for special damages.<sup>1</sup> If a master discharges a seaman against his consent and without good cause, in a foreign port, he is liable to a fine of five hundred dollars or six months' imprisonment.<sup>2</sup> And the seaman may recover, besides, full indemnity for his time lost or expenses incurred by reason of such discharge.<sup>3</sup> And where a vessel was seized in a

happen before the voyage is begun, the mariner should be paid a reasonable sum for any services actually rendered.

<sup>1</sup> *Parry v. The Peggy*, 2 Browne, Civ. & Adm. Law, 533. The statement of this case is as follows: "The promovents had agreed for monthly wages, for a voyage to the West Indies. They worked on board the ship for some days in the harbor of Dublin; afterwards the owner of the ship, having changed his mind, determined to alter the voyage, and to postpone the sailing of the ship, whereupon the seamen were dismissed without their wages, who now libelled against the ship. As surrogate of the admiralty, I decreed for the seamen, on the reason of the thing, and the authority of *Wells v. Osmond*, 2 Show. 238." What wages were decreed does not appear.

<sup>2</sup> Act of 1825, c. 65, § 10, 4 U. S. Stats. at Large, 117. In *United States v. Netcher*, 1 Story, 307, Mr. Justice Story, speaking of the tenth section of the above act, said: "In my judgment, this section enumerates three distinct and independent offences. 1. The maliciously and without justifiable cause forcing any officer or mariner on shore in any foreign port. 2. The maliciously and without justifiable cause leaving such officer or mariner behind in any foreign port; and 3. The maliciously and without justifiable cause, refusing to bring home again all the officers and mariners of the ship in a condition to return, and willing to return on the homeward voyage." In *United States v. Ruggles*, 5 Mason, 192, "maliciously" in this act was held to mean an act wantonly done, that is, with a wilful disregard of right and duty, an act done contrary to a man's own convictions of duty. See also *United States v. Coffin*, 1 Sumner, 394; *United States v. Lunt*, 1 Sprague, 311.

<sup>3</sup> *Crapo v. Allen*, 1 Sprague, 184. In *Emerson v. Howland*, 1 Mason, 45, 53, Mr. Justice Story said: "In some adjudged cases, indeed, wages up to the successful termination of the voyage have been allowed; in others, wages up to the return of the seaman to the country where he was originally shipped, without reference to the termination of the voyage. *The Beaver*, 3 Rob. Adm. 92; *Robinet v. The Ship Exeter*, 2 Rob. Adm. 261; *Hoyt v. Wildfire*, 3 Johns. 518; *Brooks v. Dorr*, 2 Mass. 39; *Ward v. Ames*, 9 Johns. 138; *Sullivan v. Morgan*, 11 Johns. 66; *Rice v. The Polly and Kitty*, 2 Pet. Adm. 420, 423, note; *Mahoon v. The Gloucester*, 2 Pet. Adm. 403, 406, note; *The Littlejohn*, 1 Pet. Adm. 115, 119, 120. But these apparent contrarieties are easily reconcilable, when the circumstances of each case are carefully examined. In all the

foreign port for a debt of its owner and sold by order of a State court, and the seamen remained by the vessel until the sale, and were obliged to obtain food at their own expense, the owner having made no provision for their subsistence, wages were allowed up to the time of sale, the expense of board, and \$10 for each of the libellants for his time and expense in returning home.<sup>1</sup> And in cases where the voyage is broken up by misfortune, so that the master would be justified in discharging the crew, they would still

cases, a compensation is intended to be allowed, which shall be a complete indemnity for the illegal discharge, and this is ordinarily measured by the loss of time, and the expenses incurred by the party. It is presumed that after his return home, or after the lapse of a reasonable time for that purpose, the seaman may, without loss, engage in the service of other persons, and where this happens to be the case, wages are allowed only until his return, although the voyage may not then have terminated. On the other hand, if the voyage have terminated before his return, or before a reasonable time for that purpose has elapsed, wages are allowed up to the time of his return, for otherwise he would be without any adequate remedy. Cases, however, may occur of such gross and harsh misbehavior, or wanton injustice, as might require a more ample compensation than could arise from either rule." See also *Jones v. Sears*, 2 Sprague, 43; *The Union*, Blatchf. & H. Adm. 545; *Farrell v. French*, Blatchf. & H. Adm. 275; *The Maria*, id. 331; *Brunent v. Taber*, 1 Sprague, 243; *Nevitt v. Clarke*, Olcott, Adm. 316; *The Nimrod*, Ware, 9; *Hutchinson v. Coombs*, id. 65; *Ex parte Giddings*, 2 Gallis. 54. No deductions are made, except that the wages earned on the homeward voyage are to be deducted from the expenses allowed for the return. *Emerson v. Howland*, 1 Mason, 45, 54; *Hutchinson v. Coombs*, Ware, 65. In *Sheffield v. Page*, 1 Sprague, 285, the mate was tortiously discharged at Calcutta. No situation was offered him as mate, and he came home before the mast. Held, that the wages thus earned by him should not be deducted from the amount decreed against the owner. See *Hoyt v. Wildfire*, 3 Johns. 518; *Nevitt v. Clarke*, Olcott, Adm. 316, 320. Where seamen were turned off from a privateer without lawful cause, they were held to be entitled to their proportion of the prizes taken during their absence. *Mahoon v. The Gloucester*, 2 Pet. Adm. 403. — As a general rule of law a breach of a statute by a master, which subjects him to a penalty, does not take away the right of a seaman, who has been injured in consequence of such breach. *Couch v. Steel*, 3 Ellis & B. 402, 24 Eng. L. & Eq. 77. In *Burke v. Buttman*, U. S. D. C. Mass., *Lowell*, J., it was claimed that the seamen might have come home in a vessel belonging to the same owners. It appeared that before the seamen were discharged they were, against their consent, transferred to this vessel, and that while there they had a controversy with the master, in which he was in the wrong. Held, under the circumstances, that they were not obliged to come home in this vessel after they were discharged.

<sup>1</sup> *The Gazelle*, 1 Sprague, 378. See also *Anderson v. Sloop Solon*, Crabbé, 17.

be entitled to their wages.<sup>1</sup> If the seaman is compelled to desert by the cruelty of the master or other officers, he has his wages in full.<sup>2</sup> Where a second mate was discharged by the consul at his own request in a foreign country, on account of the illegal conduct of the master towards him, it was held that his contract wages and expenses should be allowed, up to the time when he might have reached his original home port, deducting what he had earned, or might have earned, on his passage home.<sup>3</sup> If a person is disgraced on account of being incompetent to fulfil the duties of his office, and discharges afterwards the duties of his inferior station with fidelity, it may not be quite certain, on the authorities, how he should be rewarded, but on principle we should say that a reasonable deduction should be made from the agreed price while he filled the station for which he shipped, and that he would be entitled to the regular wages while he filled the lower station.<sup>4</sup> (And if a seaman is promoted during a voyage, he

<sup>1</sup> In *Bray v. Ship Atalanta*, Bee, 48, the vessel struck in going over Charleston Bar, and was obliged to put back to Charleston, where she was condemned as unseaworthy. Wages for the time the men were on board were decreed. In *The Elizabeth*, 2 Dods. 403, the vessel was at a foreign port in a state of distress. As it would have taken a long time to make the repairs, the master discharged the crew, as he alleged, with their consent, and paid their passage home. The seamen claimed wages to the time of the vessel's return. But the court held that although the discharge was justifiable under the circumstances, yet that the crew were entitled to their wages up to the time of their return home. The consent on their part to the discharge, was held not to be voluntary, as there was no alternative but starvation left. In *The Fair American*, Bee, 134, it was held that seamen who had been taken by a privateer from their vessel, and rejoined her at the earliest opportunity, were entitled to their wages, as they were absent without any fault of their own, and that, as the first voyage was defeated, the seamen were bound to continue with the vessel till the voyage in contemplation was ended, and at the same rate of wages, and that they should receive two thirds of what was due to them, and the remainder at the next port of delivery.

<sup>2</sup> *Sherwood v. McIntosh*, Ware, 109; *The America*, Blatchf. & H. Adm. 185; *Knowlton v. Boss*, 1 Sprague, 163; *The Minerva*, 1 Hagg. Adm. 347; *Ward v. Ames*, 9 Johns. 138; *Limland v. Stephens*, 3 Esp. 269; *Prince Edward v. Trevellick*, 4 Ellis & B. 59, 28 Eng. L. & Eq. 205. In *Rice v. The Polly & Kitty*, 2 Pet. Adm. 420, wages were only demanded for the time the seamen remained on board.

<sup>3</sup> *Foye v. Dabney*, 1 Sprague, 212.

<sup>4</sup> *Brunent v. Taber*, 1 Sprague, 243. It is very obvious that he would not be allowed to obtain the rate of wages for which he shipped, if he were unfit for the station; nor would the wages of the inferior station be a criterion of the proper rate of recompense before he was disgraced. Judge Ware, in *Sherwood v. Mc-*

is entitled to the wages of that station thenceforward.<sup>1</sup>) So if the master dies on a voyage, and the mate takes his place, the latter is entitled to wages from that time as master.<sup>2</sup> A seaman is entitled to the whole of his wages, although disabled by sickness, even if by reason of that sickness he was obliged to be left at a foreign port,<sup>3</sup> and *a fortiori* if having been sent ashore on the ship's business he there fall sick.<sup>4</sup> But if he recover and may rejoin his

Intosh, Ware, 109, 110, after stating for what a man might be disrated, said: "In such a case the master will also be justified, not in refusing altogether to pay him wages, but in making from them a reasonable deduction." In *The Elizabeth Frith*, Blatchf. & H. Adm. 195, 210, it does not clearly appear what wages were allowed. The language of the court is: "The cook was properly degraded, and can only recover wages for the duties he performed, namely, those of an ordinary seaman." In *Smith v. Jordan*, U. S. C. C. Mass., 1857, 21 Law Rep. 204, where a cooper was degraded to the position of a foremast hand, when the court considered he should have been tried as a cooper's mate, it was held that he should receive the wages of the latter office. In *Wheatley v. Hotchkiss*, 1 Sprague, 225, the libellant shipped as an able seaman, but was in fact competent to perform only the duties of a green hand. It was held that the measure of compensation for his services was not the wages of a green hand for such a voyage, but only what his services were actually worth to the owners. No wages were allowed in *The Buena Vista*, 3 Blatchf. C. C. 510, where a steward was utterly incompetent and unskilful.

<sup>1</sup> *The Sch. Wm. Martin*, 1 Sprague, 564.

<sup>2</sup> *Smith v. Curtis*, 5 Allen, 367.

<sup>3</sup> *Mahoon v. Brig Gloucester*, Bee, Adm. 395; *Croucher v. Oakman*, 3 Allen, 185. In *Chandler v. Grieves*, 2 H. Bl. 606, note, the plaintiff shipped on a voyage from London to Honduras, thence to Philadelphia, and thence back to England. While in the Bay of Honduras the plaintiff was injured while on duty, and was afterwards put ashore at Philadelphia, and his wages up to that time paid. This action was brought to recover wages for the whole voyage. The court were of the opinion that the rules of maritime law should govern, and directed an inquiry to be made in the courts of admiralty, whether, according to the usage there, a disabled seaman would, under similar circumstances, recover wages for the whole voyage. On an inquiry being made, it was found "that in every instance, a seaman disabled in the course of his duty was holden to be entitled to wages for the whole voyage, though he had not performed the whole." In *Hainey v. The Tristram Shandy*, Bee, Adm. 414, the libellant was sent in with a prize, and soon afterwards fell sick. The vessel during the cruise, came into the same port to refit, and a part of the crew left her, and the old cruise was broken up, and new articles entered into without the libellant's consent. Held, that he was entitled to recover his share of all prizes taken before the time expired for which the original articles were signed, notwithstanding he was on shore, sick, at the time. See also *Nevitt v. Clarke, Olcott*, Adm. 316; *Shakerly v. Pedrick, Crabbe*, 63; and cases *post*, p. 80, *et seq.*

<sup>4</sup> *Hart v. The Littlejohn*, 1 Pet. Adm. 115, 117, per *Peters, J.*

ship, but does not, this stops his wages from the day when he could have joined her.<sup>1</sup> Of course, if the sickness was caused by the fault of the seaman, he is not entitled to any wages during the time he is off duty.<sup>2</sup>

In some of the southern States of this country, colored seamen were formerly imprisoned during the stay of the vessel in the port, and the master was obliged to pay the expenses of such imprisonment. He was not, however, allowed to deduct such sum from the wages of the seamen.<sup>3</sup>

If a seaman wrongfully discharged, and therefore claiming full wages, has earned other wages in another vessel, in an intermediate time, it would seem that the question, whether these wages are to be deducted, would be affected, at least, if not determined, in this country, by the question, whether the wages allowed after the deduction give him an adequate indemnity.<sup>4</sup> So, whether seamen should have wages to the end of a prosperous voyage,

<sup>1</sup> *Williams v. The Hope*, 1 Pet. Adm. 138.

<sup>2</sup> *Johnson v. Huckins*, 1 Sprague, 67. The libellant, in this case, admitted that the sickness was caused by his own fault, and deducted the amount which would have been due, while he was off duty. The court held that the respondents were also entitled to set off the amount due for board and subsistence during the sickness, but not wages paid a substitute, there being no evidence that these amounted to more than the wages deducted. See *Jones v. Sears*, 2 Sprague, 43.

<sup>3</sup> *The Cynosure*, 1 Sprague, 88. Such acts are unconstitutional and therefore invalid. *The Ship Wm. Jarvis*, 1 Sprague, 485.

<sup>4</sup> *Emerson v. Howland*, 1 Mason, 45, 54; *Hutchinson v. Coombs*, Ware, 65. See *Hoyt v. Wildfire*, 3 Johns. 518. The principle laid down by Mr. Justice Story in the case first above cited is, that in no case are the wages earned in the intermediate time to be deducted from the wages due, but merely from the expenses of the return to the home port, and that even then they are not to be deducted, if such a course would deprive the seaman of his just indemnity. In *Sheffield v. Page*, 1 Sprague, 285, it was held that when an officer was tortiously discharged at a foreign port, he was not obliged to work his way home as an ordinary seaman, and that if he did so, not being able to obtain the situation which he had before held, wages thus earned were not to be deducted. When this case came up on appeal, this point does not appear to have been controverted. *Page v. Sheffield*, 2 Curtis, C. C. 377. See *Hunt v. Colburn*, 1 Sprague, 215; *The Sch. Wm. Martin*, 1 Sprague, 564; *Jones v. Sears*, 2 Sprague, 43. In *Bates v. Seabury*, 1 Sprague, 433, the seaman was wrongfully discharged in a foreign port, and came home in another vessel at higher wages. Held, that he was entitled to the wages earned in the first vessel, and that it was not proper to deduct the wages earned in the second vessel from what would have been due had he completed the voyage in the first.

however long, or only wages to the time when they actually reached home, or might have reached home, must depend upon the circumstances and merits of each case.<sup>1</sup> The right of the seamen is in fact a claim for damages for breach of contract, and there should be an indemnity. That is, they should be put into as good a condition as they would have been in, had the contract been performed.<sup>2</sup> Thus, if the discharge is caused by a disaster which is almost a wreck, making the repairs expensive and of doubtful utility, the least expense and wages which will bring them home would seem to be all they should have.<sup>3</sup> If the master detains the clothes of the seaman, damages for the detention may be recovered in the libel for the wrongful discharge.<sup>4</sup>

The vessel and owners are not, however, liable in such a case, unless the owners have ratified the acts of the master, or upon demand have refused to deliver the clothing.<sup>5</sup>

If a seaman is discharged with his own consent in a foreign port, wages *pro rata* will generally be allowed, unless the parties agree upon other terms. If an agreement is made, it will be upheld if it appears to the court to be just and reasonable.<sup>6</sup>

We shall hereafter consider in what cases the three months'

<sup>1</sup> See cases cited *ante*, p. 50, n. 3.

<sup>2</sup> The *Dawn*, Ware, 485, 494, per *Ware*, J. See *Richardson v. Mellish*, 2 Bing. 229; *The Camilla*, Swabey, Adm. 312. In *Parsons v. Terry*, U. S. D. C. Mass., *Louell*, J., the master was dispossessed of his office, and claimed to recover, in addition to the damages which naturally resulted from the breach of contract, further damages on the ground that the owners entertained suspicions of his integrity and competency as a master, and had assigned those suspicions as the reason for their action. The judge found, as a matter of fact, that there was no fraud or actual malice on the part of the owners, that such suspicions were not well founded, there being some slight cause for anxiety and distrust, and held that, although the action was tort, the gist of it was the breach of contract, and that only those damages which naturally resulted from the breach of contract could be recovered.

<sup>3</sup> See *The Elizabeth*, 2 Dods. 403, cited *ante*, p. 52, n.

<sup>4</sup> *Hutchinson v. Coombs*, Ware, 65; *Hunt v. Colburn*, 1 Sprague, 215.

<sup>5</sup> *The Hibernia*, 1 Sprague, 78. See *Hunt v. Colburn*, *id.* 215. In *Nevitt v. Clarke*, Olcott, Adm. 316, 321, it was held that in the absence of any proof, the court would not infer that a seaman's clothes were detained when he left the ship to be placed in a hospital, and the court said: "The inference that a sailor's wearing apparel is detained by the ship could never be raised, except in case of his desertion, or being forcibly put ashore, or wrongfully abandoned by the master when ashore."

<sup>6</sup> *Hathaway v. Jones*, 2 Sprague, 56.

wages, payable to the American consul in case of the discharge abroad of an American seaman, are due,<sup>1</sup> and the seaman may, it is held, if the amount is not paid to the consul, recover it at home by a suit in admiralty, and the court will decree two months' wages to be paid over to him, retaining the other third for the United States.<sup>2</sup> But it has been doubted whether it was, by the terms of the statute, payable anywhere or to any person but the American consul,<sup>3</sup> or recoverable at common law.<sup>4</sup> If the money is paid over to the consul and he retains it, it has been held that the owners, having complied with the act of Congress, are no further liable.<sup>5</sup> But if the discharge is without the consent of the seaman, it is no defence that the money has been paid to the consul, if the seaman has derived no benefit from it.<sup>6</sup> A discharge when made in a foreign port is required to be made before the consul, but the payment of wages already due is not; and the consul had no right to charge a commission for witnessing the settlement.<sup>7</sup>

And if the libellant is named as an American seaman in the master's list of the crew, this entitles him to recover, although omitted to be named as such seaman in the list of the crew certified from the collector's office.<sup>8</sup>

If, by the shipping articles, the wages are not to be paid until

<sup>1</sup> See *post*, p. 84, n. 5; p. 85, n. 1.

<sup>2</sup> *Emerson v. Howland*, 1 Mason, 45; *Orne v. Townsend*, 4 Mason, 541; *Pool v. Welsh*, Gilpin, 193; *Bates v. Seabury*, 1 Sprague, 433. In the following cases it does not clearly appear whether the owners were held liable for more than two months' wages. *The Dawn*, Ware, 485; *The Saratoga*, 2 Gallis. 164; *Wells v. Meldrun*, Blatchf. & H. Adm. 342.

<sup>3</sup> See *Pool v. Welsh*, Gilpin, 193.

<sup>4</sup> In New York, the supreme court of the State has held that the seamen cannot recover this amount at common law. *Ogden v. Orr*, 12 Johns. 143; *Van Beuren v. Wilson*, 9 Cow. 158. The English admiralty court has also refused to enforce this provision, on the ground of their having no jurisdiction, it being a municipal regulation of a foreign country. *The Courtney*, Edw. Adm. 239.

<sup>5</sup> *Fredericksen v. 290 Barrels Sperm Oil*, U. S. D. C. Mass., 1859. It appears from this case, that it is the universal custom of the American consul at Fayal to retain the three months' wages, on account of the United States, and to pay no part thereof to the seamen. This case is reported, but not on this point, in 1 Sprague, 475.

<sup>6</sup> *Brunent v. Taber*, 1 Sprague, 243. See also *Jones v. Sears*, 2 Sprague, 43.

<sup>7</sup> *Hathaway v. Jones*, 2 Sprague, 56.

<sup>8</sup> *Orne v. Townsend*, 4 Mason, 541.

the voyage is wholly ended, there is a difficulty in recovering them at common law, if the voyage be interrupted or broken up at any intermediate port, but there is none whatever in admiralty; for on a libel for wages, stating facts of this kind, and making out a case where the wages are not forfeited, but they, or compensation in some form, are earned, the court will decree either wages as such, or damages in the form or stead of wages.<sup>1</sup>

The owner is bound by a contract made by a master for services to be paid by shares, as much as if by wages.<sup>2</sup> But when a seaman, who had contracted for wages, had been fraudulently induced to sign articles by which he was to have shares instead, it was held, even at common law, that the first contract was in force and the latter not;<sup>3</sup> and it would undoubtedly be so held in admiralty. A contract to serve as seamen for shares, either on a fishing or whaling voyage, does not constitute a partnership. This is now settled, as well at common law as in admiralty;<sup>4</sup> nor would it make a partnership between one who shipped as mate and the master or owner.<sup>5</sup>

If a minor goes to sea against the will of his parent or guardian, the owners of the vessel are liable in tort, as we shall see hereafter,<sup>6</sup> or the parent may sue in contract; but in such a case he cannot recover what the minor's services would have been worth had he remained on shore, but is entitled to recover only on a

<sup>1</sup> The difficulty at common law, mentioned in the text, is not felt in admiralty, since it has been repeatedly decided that the seaman's right to wages flows from the service, and not from the contract or shipping articles. See *Mahoon v. Brig Gloucester, Bee*, Adm. 395, where the point was decided in answer to a plea to the jurisdiction; and *The Trial*, 1 Blatchf. & H. Adm. 94, where the point was directly decided. Also in *Moran v. Baudin*, 2 Pet. Adm. 415, a seaman sued for his wages because the captain had deviated repeatedly from the voyage agreed upon, and although the parties were both Frenchmen, and the ship had not returned to the port to which she was to return, wages were decreed. The decision was based partly on the ground that such was the French law. *The Dawn, Ware*, 485, will be found to be directly in point. The ship was sold by reason of a disaster, and though the two months' extra pay was not allowed, the wages were.

<sup>2</sup> *Baker v. Corey*, 19 Pick. 496.

<sup>3</sup> *Baker v. Corey*, 19 Pick. 496.

<sup>4</sup> See cases *ante*, p. 48, n. 1.

<sup>5</sup> *The Crusader, Ware*, 437.

<sup>6</sup> See *post*, Book II. Chap. XII.



*quantum meruit*.<sup>1</sup> If after part of a whaling voyage has been performed a seaman ships in a foreign port for the residue of the voyage at a lay of one ninetieth, and performs his contract, he is entitled to one ninetieth of the products of the voyage taken during his time of service, and not to such proportion of one ninetieth of all the oil taken during the whole voyage, as the time he served was of the whole voyage.<sup>2</sup>

If any political events, as a change from war to peace, greatly diminished the risk of the service, on account of which risk the wages were very high, they are nevertheless undiminished by this change.<sup>3</sup>

If a seaman, on monthly wages, dies during the voyage, it is certain that wages are due to his representatives to the time of his death. But it is quite uncertain whether they are due to the end of the voyage. We think they are not.<sup>4</sup> Any bargain

<sup>1</sup> *Weeks v. Holmes*, 12 Cush. 215. It was also held in this case that the defendant could not set off the advances and outfits paid to the minor on the voyage. See *Lovrein v. Thompson*, 1 Sprague, 355.

<sup>2</sup> *Tompkins v. Howard*, 1 Sprague, 167.

<sup>3</sup> In *Shaw v. The Lethe, Bee*, 424, and *McCulloch v. The Lethe, Bee*, 423, it was decided that freight has no connection with the *quantum* of wages. It was argued that peace freight only having been earned on the voyage back from Bordeaux, peace wages only ought to be paid, as freight was the mother of wages. The court said that the service or the bargain governed the amount of the wages, and earning of freight governed the payment of them. In this case, the outward voyage was during war, and the homeward voyage was during peace, but the actual risk of war had been incurred. But in *Brice v. The Nancy, Bee*, 429, the shipping articles had been signed in January, 1783; the vessel did not enter the sea until March 20th. On March 3d peace was made. The court said that it was no fault of the men that the ship did not go to sea immediately after the signing of the articles, and therefore they should have wages according to the contract; but as they had incurred no actual risk, they should have only peace wages from March 3d to the completion of the voyage.

These cases appear to be inconsistent. The first seems to us to rest on sounder principles. The rule involved in it may sometimes work a hardship; but it is founded on the well-known principle that the contract is not apportionable.

<sup>4</sup> Whether wages are due for the whole voyage, has been, and perhaps is, a vexed question; and it has been decided both ways. In *Walton v. The Neptune*, 1 Pet. Adm. 142; *Scott v. The Greenwich*, id. 155; *Jackson v. Sims*, id. 157, Judge *Peters* decided that they were due for the whole voyage. The last case was affirmed by Mr. Justice *Washington*, 1 Wash. C. C. 414; 1 Pet. Adm. 157, n. See also *Johnson v. The Coriolanus, Crabbe*, 242. But *Carey v. The Kitty, Bee*, 255, decided by Judge *Bee*, and *Natterstrom v. The Hazard, Bee*, 441, decided

for wages, for any illegal service, is void;<sup>1</sup> as for serving in the slave-trade, if forbidden by law,<sup>2</sup> or in an unauthorized expedition in breach of the neutrality laws.<sup>3</sup> So an action will not lie by a pilot for services rendered to a vessel of the enemy.<sup>4</sup> We should, however, as to these cases, say that if the nature of the service was unknown to the person doing the service, he should recover.<sup>5</sup>

The right of a seaman to look to the owners of the vessel for his wages, does not cease on an abandonment by the owners of the vessel and freight to the underwriters,<sup>6</sup> or by a transfer of their interest to third parties in any form.<sup>7</sup> The lien of seamen for their

by Judge *Davis* of Massachusetts, and *Jones v. Smith*, U. S. C. C. Maryland, 4 Hall Am. Law Journal, 276, are the other way. In *Hanson v. Rowell*, 1 Sprague, 117, 118, Judge *Sprague* says: "In this district, the settled practice is to allow wages only to the time of the death." The case of *Luscomb v. Prince*, 12 Mass. 576, we do not consider as an authority either way. The only question was whether the contract was so far an entirety that misconduct operated as a forfeiture of all the wages, and the court held that the contract was not entire, and said: "There is no doubt that the wages of seamen may be apportioned. If they die during a voyage, their representatives are to receive what is due at the time of their death." Further on, it is said: "In some cases he would share in all the captures made during the cruise, even after his disability; as in case of sickness or death." See *Cutter v. Powell*, 6 T. R. 320.

<sup>1</sup> The *Langdon Cheves*, 2 Mason, 58. In *The Helen*, Law Rep. 1 Adm. 1, it was held that it was not a municipal offence by the law of nations for a neutral to carry on trade with a blockaded port, and that wages earned on such a voyage could be recovered.

<sup>2</sup> The *St. Jago de Cuba*, 9 Wheat. 409; *The Vanguard*, 6 Rob. Adm. 207; *The Wanderer*, U. S. D. C. Mass., *Sprague*, J.

<sup>3</sup> The *Leander*, Edw. Adm. 35.

<sup>4</sup> The *Benjamin Franklin*, 6 Rob. Adm. 350.

<sup>5</sup> The *Malta*, 2 Hagg. Adm. 158; *Sheppard v. Taylor*, 5 Pet. 675; *Hoyt v. Wildfire*, 3 Johns. 518; *The Wanderer*, U. S. D. C. Mass., *Sprague*, J. This principle was fully recognized in *The St. Jago de Cuba*, 9 Wheat. 409, where material-men who had fitted out a vessel, and seamen who had shipped in ignorance of the intended illegal voyage, were held entitled to recover. See also *The Mary Ann*, Abbott, Adm. 270, where this doctrine was asserted, but the point was not determined, as the court were of the opinion that the crew of a vessel had no right to seize her on suspicion that she was a slaver, and bring her home, although they acted in good faith in so doing. In *The Sch. Mary*, 1 Sprague, 204, a suit was brought for wages. It appeared that the vessel had sailed under a coasting license, which expired before the trip was made during which the wages in question were earned. It was held that as there was no evidence that the seamen knew that the license had expired, they were entitled to recover.

<sup>6</sup> *Brooks v. Dorr*, 2 Mass. 39; *Brown v. Lull*, 2 Sumner, 443.

<sup>7</sup> *Sheppard v. Taylor*, 5 Pet. 675.

wages attaches to the ship and the freight, and all the proceeds of both or either, and follows them into whose hands soever they may go.<sup>1</sup> It remains, whether the fund from which it should be paid remains entire, or is broken in upon and in part lost.<sup>2</sup> The crew of a neutral vessel, seized and condemned by a prize court for carrying contraband of war, have no lien on the vessel for their wages.<sup>3</sup> But if a ship be seized and condemned, and afterwards restored, and an allowance be made to the owner by way of compensation for freight, these proceeds represent the ship and the freight, and are liable to this lien as such.<sup>4</sup> Nor does a sale,<sup>5</sup> even

<sup>1</sup> *Brown v. Lull*, 2 Sumner, 443. And where a boiler was put into a steamer by the makers, under an agreement that it should continue their property until paid for, with a right to remove it should any instalments be overdue, and instalments were unpaid and overdue, it was held that the seamen had a lien on the boiler. *The Steamer May Queen*, 1 Sprague, 588.

<sup>2</sup> *Pitman v. Hooper*, 3 Sumner, 50, 286.

<sup>3</sup> *The Lilla*, 2 Sprague, 192.

<sup>4</sup> In the case of *Brown v. Lull*, 2 Sumner, 443, Lull shipped as mariner on board the "Two Betseys," which was taken in the port of Naples and condemned. Under the treaty of indemnity, \$4,000 were allowed to the owners for the brig, and \$5,640 for freight, as an indemnity for his losses. A clause in the shipping articles stipulated that, if the brig was detained thirty days at any time, the wages should cease during that time. This clause was disregarded by the court. *Story, J.*, laid down the law as follows: "Some principles, applicable to the present case, are now so clear that they need only be stated, although, at a former time, they were subject to many learned doubts. The capture of a neutral ship does not of itself operate as a dissolution of the contract for mariner's wages, but, at most, only as a suspension of the contract. If the ship is restored and perform her voyage, the contract is revived, and the mariner becomes entitled to his wages; that is, to his full wages for the whole voyage, if he has remained on board and done his duty; or if, being taken out, he has been unable, without any fault of his own, to rejoin the ship. If the ship is condemned by a sentence of condemnation, then the contract is dissolved, and the seamen are discharged from any further duty on board, and they lose their wages, unless there is a subsequent restitution of the property, or of its equivalent value, upon an appeal or by treaty, with an allowance for freight, in which event their claim for wages revives. In the case of a restitution in value, the proceeds represent the ship and freight, and are a substitute therefor. If freight is decreed or allowed for the whole voyage, the mariners are entitled to wages for the whole voyage; for the decree for freight in such a case includes an allowance of the full wages, and consequently creates

<sup>5</sup> Where a vessel is sold, the seaman is entitled to his wages up to the actual sale of the vessel, and not merely to the time of the advertisement of such sale. *Lang v. Holbrook*, *Crabbe*, 178.

if made by order of court under the law of foreign attachment, avoid this lien, but admiralty will still enforce it. For it is now quite settled, that if a vessel is under attachment by process from

a trust or a lien to that extent thereon, for the benefit of the mariners. If the freight decreed or allowed is for a part of the voyage only, the seamen are ordinarily entitled only to wages up to the time for which the freight is given, unless under special circumstances; as where they have remained by the ship, at the special request of the master, to preserve and protect the property of all concerned."

Full wages were given in this case to the time of the mariner's return home, notwithstanding the whole indemnity had not been paid. It is said (on page 452), "The next and last objection which has been made is, that the respondents have received certain instalments only of the sums awarded under the treaty, and not full payment. It is admitted that they have received far more than is sufficient to pay all the wages of the seamen, and that is sufficient to dispose of this objection. The wages of seamen attach as a lien to the ship and freight, and their proceeds, into whosoever hands they may come, as a claim or privilege, having a priority to be satisfied before all other claims. As it has been sometimes expressively said, they are nailed to the last plank of the ship. The ship is a pledge for the payment, while a single fragment remains of the wreck or of its proceeds." See also *Vandever v. Tilghman, Crabbe*, 66.

In *Pitman v. Hooper*, 3 Sumner, 50, the libellant sued for wages earned on board a ship which was captured by the Danes; and an indemnity of about two thirds the value of the ship and cargo was given. The question for the court to decide was whether the wages were to be paid *pro rata*, in the same proportion as indemnity was received, or fully. The court held that full wages were due, as the seamen had a priority of payment for their wages.

In *Sheppard v. Taylor*, 5 Pet. 675, the proceeds of ship and freight, but not of the cargo, were held liable, although the same had been assigned to assignees prior to this suit; and it was held that the assignees were entitled to retain from the fund a proportion, *pro rata*, of the disbursements and expenses which had been actually incurred by them in prosecuting their claim before commissioners under a treaty with the government which seized the vessel, and also a commission of two and a half per cent as a compensation for their services in and about the prosecution. But it was held that the owners of the vessel were not entitled to deduct anything for their services in obtaining the restoration. The court having ordered the case to be sent back to the circuit court to determine the amount due the seamen, the assignees petitioned that they might offer in evidence the record of the proceedings in the circuit court, sitting as a court of chancery, in relation to the fund in question, in which the money received by them was, by order of court, paid into court, and by a decree of the court distributed among several claimants. The court granted this petition, reserving to the circuit court the full right and liberty to judge whether the same suits, or either of them, were properly admissible, or competent as evidence in any matter before the court in the further proceedings in the cause.

a State court, the lien cannot be enforced as long as the vessel remains in the custody of the officer of the State; but as soon as the attachment is dissolved, or the vessel sold under it, admiralty process may issue, and the vessel is liable *in rem* notwithstanding the sale.<sup>1</sup> But where the seaman is also part-owner and the vessel has been sold on execution against the owners, it is held that the lien of the part-owner, if he ever had one, no longer exists.<sup>2</sup>

And if a ship be bottomed or hypothecated, the lien of the seamen for wages prevails over the bond, for the same reason that makes a later bond for bottomry prevail over an earlier; for the later saved the ship, and the service of the seamen saved it for all who claim under bonds or liens.<sup>3</sup> This lien does not depend upon possession, like a common-law lien, but is rather the *privilegium* of the civil law; nor is it lost when possession is gone; but it may be lost by such delay as indicates waiver, or amounts to negligence.<sup>4</sup>

It is held in England, that the lien upon a foreign vessel for collision takes precedence of the lien of the seamen for their wages.<sup>5</sup>

The lien is not lost, because the seaman receives a master's order on the owner or charterer for his wages,<sup>6</sup> or by his taking a note of the master, not negotiable, and putting it in suit;<sup>7</sup> nor even by his receiving a negotiable note for his wages, unless he is distinctly told that such will be its effect; nor even then, unless something is given him by way of security or other advantage or compensation for giving up his lien.<sup>8</sup> Nor is a receipt in full any-

<sup>1</sup> The *Barque Havana*, 1 Sprague, 402; The *Gazelle*, 1 Sprague, 378. See also *post*, Book II., Chap. II., Sect. 3.

<sup>2</sup> *Gallatin v. The Pilot*, 2 Wallace, C. C. 592, overruling *Foster v. Steamboat Pilot No. 2*, 1 Newb. Adm. 215, 1 Am. Law Reg. 403.

<sup>3</sup> See cases *ante*, Vol. I. p. 160, n. 4.

<sup>4</sup> See *post*, Book III., on Admiralty Practice, ch. 2, § 1.

<sup>5</sup> The *Linda Flor*, Swabey, Adm. 309. So held also by Judge *Kelly*, in the Irish Admiralty. The *Duna*, 5 Law T. n. s. 217. This is put partly on the ground that the vessel injured has no other remedy, while the seamen can look to the master and owners, and partly on the ground that as the fault of the crew contributed to the collision, it would be inequitable to give them the preference.

<sup>6</sup> The *Eastern Star*, Ware, 185. But if the seaman is offered money, and prefers a bill of exchange upon the owners, in order to send the money home, he cannot afterward, on the owners becoming bankrupt, proceed against the vessel *in rem*. The *William Money*, 2 Hagg. Adm. 136.

<sup>7</sup> The *Harriet*, 1 Sprague, 33.

<sup>8</sup> The *Betsey & Rhoda*, Daveis, 112.

thing more than *prima facie* evidence; nor does a seal make any difference in admiralty.<sup>1</sup>

By our statutes, fishermen on shares have also a lien for their shares.<sup>2</sup> And if a vessel is forfeited to the government for a violation of law, the lien for wages of those seamen, who were ignorant of the illegality of the voyage, will be preferred to the claim of the government.<sup>3</sup> So it is held that this lien is possessed by seamen on board a letter of marque;<sup>4</sup> but not by those on board public ships of war, domestic or foreign.<sup>5</sup> It has been doubted, whether a vessel in the service of government as a post-office packet, could be arrested in a suit for wages, on account of the detriment to the public service which would be occasioned thereby.<sup>6</sup> We shall consider hereafter who are considered as seamen, so as to entitle them to this lien.

An embargo neither destroys nor suspends the right to wages, if the voyage be afterwards completed, or a new one be substituted for it.<sup>7</sup> But if the embargo is never remitted, that is, if it be in fact a seizure or arrest, and if the voyage is broken up by it without the fault of the owner or his servants, then it puts a stop to the claim for wages, like any other extraordinary termination of the voyage.<sup>8</sup> And if, in the course of the outward voyage, a vessel be seized, and carried out of her way and detained, and afterwards resumes and completes her voyage, and arrives at her port of de-

<sup>1</sup> See cases *ante*, p. 41, n. 1.

<sup>2</sup> In respect to the lien of mariners generally by statute, see act of 1790, ch. 29, § 6, 1 U. S. Stats. at Large, 133. The act of June 19, 1813, ch. 2, § 2, 3 U. S. Stats. at Large, 2, provides that the vessel shall be liable for six months after the fish caught on board the vessel during the voyage, "shall be delivered to the owner or to his agent for cure, and shall be sold by said owner or agent."

<sup>3</sup> The *St. Jago de Cuba*, 9 Wheat. 409.

<sup>4</sup> *Ellison v. Ship Bellona*, Bee, Adm. 112.

<sup>5</sup> *De Moitez v. The South Carolina*, Bee, Adm. 422.

<sup>6</sup> The *Lord Hobart*, 2 Doda. 100. The post-office department acquiesced in the jurisdiction, and the point was not therefore determined.

<sup>7</sup> *Marshall v. Montgomery*, 2 Dall. 170. See also cases *ante*, Vol. I. p. 220, n. 2. If the seamen are taken out of the ship during the embargo, they are entitled to recover wages for the time they are thus absent against their will, as well as for the time they are on board. *Delamainer v. Winteringham*, 4 Camp. 186; *Beale v. Thompson*, 3 Bos. & P. 405, 4 East, 546, 1 Dow. 299.

<sup>8</sup> The *Saratoga*, 2 Gallis. 164.

livery, the seaman is entitled to his wages for the whole time of such detention, although the ship be lost on the return voyage.<sup>1</sup> So if the ship be recaptured; deducting, however, a proper sum for salvage;<sup>2</sup> and if ransom be paid, an allowance or deduction should be made for that.<sup>3</sup> But where a ship is captured and released, seamen are not bound to contribute to the expenses except in a case of ransom.<sup>4</sup>

Generally, the seamen taken out of a captured ship, which is afterwards released and performs her voyage, have their full wages, deducting, however, what other wages they may have earned.<sup>5</sup> But if a neutral seaman be taken from a ship by impressment and never rejoin her, he has only *pro rata* wages.<sup>6</sup> And it has been held that if a seaman is, in pursuance of an act of the legislature, taken from the ship and sent home as a witness in a

<sup>1</sup> Hooper v. Perley, 11 Mass. 545, 548, per Jackson, J.

<sup>2</sup> Hart v. The Littlejohn, 1 Pet. Adm. 115; Howland v. The Lavinia, 1 Pet. Adm. 123. In Bergstrom v. Mills, 3 Esp. 36, full wages were allowed, the point as to deduction for salvage not being taken. But in The Friends, 4 Rob. Adm. 143, it was held that a recapture which did not restore the seaman to his vessel, did not revive the right to wages which was lost by the capture. This, however, is opposed to the American cases above cited.

<sup>3</sup> Girard v. Ware, Pet. C. C. 142. In Chandler v. Meade, cited in Wiggins v. Ingleton, 2 Ld. Raym. 1211, the ship was captured and ransomed, and the seaman was afterwards impressed. It was held that he was not entitled to wages unless an usage to this effect was shown.

<sup>4</sup> The Saratoga, 2 Gallis. 164.

<sup>5</sup> Singstrom v. The Hazard, 2 Pet. Adm. 384; Brooks v. Dorr, 2 Mass. 39; Wetmore v. Henshaw, 12 Johns. 324; Willard v. Dorr, 3 Mason, 91, 161. See the long-contested case of Beale v. Thompson, 3 Bos. & P. 405, 4 East, 546, 1 Dow. 299.

<sup>6</sup> In Watson v. The Brig Rose, 1 Pet. Adm. 132, it was decided that a seaman impressed and not permitted to rejoin his ship, could not recover wages for the whole voyage; because the impressment was a personal wrong done to himself; capture being a misfortune to which he is subject as a citizen of a certain country. The difference between impressment and capture of a neutral, is not very clear, unless it be that the whole crew, whether taken out or not, are tied to the fate of a neutral vessel taken in for adjudication. The whole crew, however, may be said to be liable to impressment; and the fact that one member was selected for this outrage (impressment), differs from the fact that one member is selected for the commission of a scarcely more justifiable act (taking out of a neutral vessel which is sent in for adjudication), in form rather than in substance. This decision seems almost wanting in the indulgence usually shown to seamen who have been separated from the voyage. In Wiggins v. Ingleton, 2 Ld. Raym. 1211, a seaman who had been impressed recovered but *pro rata* wages.

criminal proceeding, he is only entitled to wages up to the time when he was so forced to leave, although he was no way in fault.<sup>1</sup> So, where a collision takes place between two vessels, and a seaman, under the impression that his own vessel is sinking, jumps on board the other vessel, and is not afterwards enabled to rejoin his own, he is entitled to wages to the time of his leaving.<sup>2</sup> And if his not returning is caused by the fault of his own vessel, he is entitled to wages until his return home.<sup>3</sup>

If a ship sails to several places, but is lost before the voyage is fully completed, wages are due to the last port of delivery, or, as we should hold, to her last port of arrival, and also for half the time she lies in that port, the other half being considered as belonging to the subsequent voyage on which she was lost, and therefore the wages for that voyage were not earned.<sup>4</sup> So a port of destination is a port of delivery so far as wages are concerned,<sup>5</sup> and they are earned if the ship goes there in ballast.<sup>6</sup>

<sup>1</sup> *Melville v. De Wolf*, 4 Ellis & B. 844, 30 Eng. L. & Eq. 323.

<sup>2</sup> *Hanson v. Rowell*, 1 Sprague, 117.

<sup>3</sup> Per *Sprague*, J., *ibid.*

<sup>4</sup> The general principle stated in the text has seldom been disputed, and the only question has been, whether wages should be allowed for half the time the vessel was at her last port. In *Anonymous*, 1 Ld. Raym. 739, it was held, that in case of capture, wages were allowed to the last port of delivery, and half the time of unloading there. And in *Jones v. Smith*, 4 Hall's Am. Law Journal, 276, wages were allowed to the day which was intermediate between the day when the vessel was unladen and the time of her sailing. But the rule generally followed in this country, is to take half of the time at the last port of delivery, or destination, whether the unloading occupied half the time or not, evidence being considered not to be admissible to show the exact time taken in unloading, for the purpose of rebutting this presumption. *Hooper v. Perley*, 11 Mass. 545. See also *Bordman v. Brig Elizabeth*, 1 Pet. Adm. 128, 130; *Johnson v. The Lady Walterstorff*, 1 Pet. Adm. 215; *Cranmer v. Gernon*, 2 Pet. Adm. 390; *Galloway v. Morris*, 3 Yeates, 445. In 1835, however, Judge *Hopkinson* considered that these cases were erroneously decided, and held that wages were due only up to the time of the discharge. *Bronde v. Haven*, Gilpin, 592. See also *Smith v. The Stewart*, Crabbe, 218. But in 1838, the whole subject was thoroughly reviewed by Mr. Justice *Story*, and the old rule affirmed. *Pitman v. Hooper*, 3 Sumner, 286.

<sup>5</sup> In *Giles v. Brig Cynthia*, 1 Pet. Adm. 203, a port of destination is said to be a port of delivery when a vessel goes there to obtain a cargo by funds or credits there, or by goods, money, or bills sent in and with the ship. In *Marshall v.*

<sup>6</sup> *Giles v. Brig Cynthia*, 1 Pet. Adm. 203; *The Two Catherinees*, 2 Mason, 319. The vessel in this latter case went from Newport to Gibraltar, there landed a



No special contract between the owner and freighter, varying the obligation to pay freight from that implied by the general law, has any effect upon the wages, for these are due whenever freight *is* or *might be* earned.<sup>1</sup> A voyage may, however, be so far an entirety that wages will not be earned until the ship arrives at her final port of destination.<sup>2</sup>

Montgomery, 2 Dall. 170, the plaintiff shipped on a voyage from Philadelphia to Havana, thence to Cadiz, and thence back to Philadelphia. The vessel was detained at Havana for some time by an embargo. A plan being formed to seize New Providence, a proposal was made to the vessels in port to join in the expedition, to which the captain and crew of the vessel in question assented. The vessel was to receive a specified compensation and to be freed from the embargo. She sailed, and New Providence was taken; she then started for Philadelphia, and was captured on the way. The court held, that New Providence might be considered as a port of delivery, and that the plaintiff was entitled to wages to the arrival at that place.

cargo and went in ballast to Ivica for salt, and, after taking it on board, sailed for home. It was contended that wages were only due to Gibraltar, on the ground that the outward voyage ended there, but the court held that wages were due to Ivica, and half the time the vessel was there. See also *Millott v. Lovett*, Sup. Jud. Ct. Mass., 1800, 2 Dane, Abr. 461. But in *Thompson v. Faussat*, Pet. C. C. 182, *Washington, J.*, held in a similar case, that wages were not due for the intermediate voyage.

<sup>1</sup> Anonymous, 1 Pet. Adm. 191, note; *Pitman v. Hooper*, 3 Sumner, 50, 286; *Blanchard v. Bucknam*, 3 Greenl. 1.

<sup>2</sup> *The Lady Durham*, 3 Hagg. Adm. 196. The vessel in this case sailed on a trading voyage from Liverpool to Africa, and back. She arrived off the coast of Africa, bartered away most of her outward cargo, and had nearly all of her homeward cargo on board, when she was lost. It was held that no wages were due. In *Hernaman v. Bawden*, 3 Burr. 1844, it was held that a voyage from Barnstaple to Portugal or Spain, taking in a cargo of fish at Newfoundland, was an entire voyage, and that Newfoundland was not a port of delivery, but the loading port of the cargo which was to produce the profit of the voyage. Judge *Peters*, in *Giles v. Brig Cynthia*, 1 Pet. Adm. 203, 205, seems to suppose that this case rests on the ground that the fish were to be caught off the banks of Newfoundland, "where the ocean and not a port of delivery afforded the prey;" and that "there had been no delivery, or any contemplated sale or purchase." We are, however, unable to find any thing in the facts of the case, as reported, which shows that the fish were to be caught rather than purchased at Placentia in Newfoundland, to which place the case finds that the ship went; and the case seems to turn entirely on the point that there was no port of delivery except in Portugal or Spain. In Anonymous, 1 Pet. Adm. 205, the ship went from the United States to the Northwest coast for furs, destined to Canton. The seamen shipped by the freight; that is, they were entitled to a certain portion of the freight earned. This was held to be an entire voyage from the United States to Canton. The

If the ship be lost on her outward voyage, and part of the freight have been paid in advance, under such terms that the shippers cannot receive it back, the seamen have not full wages, but in proportion to the freight paid.<sup>1</sup>

The effect of stipulations on the part of the seamen, not to demand wages until the arrival of the vessel, we have already considered, — and merely state here that the courts pay but little respect to them, but allow the seamen, in case the voyage is broken up, to recover wages as if the stipulations had not been inserted.<sup>2</sup>

A seaman cannot insure his wages,<sup>3</sup> nor derive any benefit from the insurance effected by the owners on the ship or freight;<sup>4</sup> nor by a recovery of damages for a loss of the ship by collision.<sup>5</sup>

If the owner pay advance wages, as is generally the case, they belong to the seamen absolutely, and are lost by the owner, whether any subsequent wages are earned or not.<sup>6</sup> But as "freight is the mother of wages," no more wages are earned or due if the ship and cargo are lost in any way before freight is or might be earned, whether this loss occur by capture, collision, fire, wreck, or otherwise.<sup>7</sup>

In case of wreck, or other peril, the seamen are bound to stay by the vessel, and do all that can be done to save her, or her cargo, or as much as can be saved.<sup>8</sup> And if enough is saved from the

vessel was not successful in obtaining a full cargo on the coast, and called at a port on the way to Canton where skins had been left by a vessel not fit to proceed. These were carried on freight to Canton. Held, that the seamen were entitled to a proportion of the whole freight, as well on the furs obtained on the coast as those taken in at the intermediate port.

<sup>1</sup> Anonymous, 2 Show. 282.

<sup>2</sup> See *ante*, p. 40, n. 3.

<sup>3</sup> *The Juliana*, 2 Dods. 509; *Lucena v. Crauford*, 5 B. & P. 294; *Webster v. De Tastet*, 7 T. R. 157; *The Neptune*, 1 Hagg. Adm. 239.

<sup>4</sup> *The Lady Durham*, 3 Hagg. Adm. 196; *McQuirk v. Ship Penelope*, 2 Pet. Adm. 276; *Icard v. Goold*, 11 Johns. 279.

<sup>5</sup> *Percival v. Hickey*, 18 Johns. 257, 290.

<sup>6</sup> *The Mentor*, 4 Mason, 102.

<sup>7</sup> See cases *passim*, and *The Nippon*, U. S. C. C. Mass., 13 Law Rep. 266. We would particularly call the attention of the reader to the learned argument of the counsel for the libellants, in this case, in support of the proposition that the maxim that "freight is the mother of wages," had its origin in the common-law courts of England, and is to a great extent disregarded in the decisions of the present day.

<sup>8</sup> In all the cases in which this subject is alluded to, this rule is laid down. Among the leading cases which assert it, are *Relf v. The Maria*, 1 Pet. Adm. 186;

ship, or perhaps from the cargo, they are allowed their wages under that name, or as salvage.<sup>1</sup> This question, whether seamen are entitled to compensation in the nature of salvage, or as wages, is important in many particulars, and is not one of a mere verbal difference. If compensation is given as wages, the maxim that "freight is the mother of wages" is overridden. If the seamen are entitled as salvors, the well-settled principle that salvors are mere volunteers, persons who owe no duty to the subject saved, is disregarded; for it is settled that the duty of the seamen to remain by the ship is not at an end on the occurrence of a shipwreck, but that they are bound under the contract to save as much of the

Taylor v. The Ship Cato, 1 Pet. Adm. 48; Clayton v. The Harmony, 1 Pet. Adm. 70; Giles v. Brig Cynthia, 2 Pet. Adm. 203; Jurgenson v. The Snow Catharina Maria, 2 Pet. Adm. 424; The Saratoga, 2 Gallis. 164; Lewis v. The Elizabeth & Jane, Ware, 41; Pitman v. Hooper, 3 Sumner, 50; The Dawn, Daveis, 121; Adams v. The Brig Sophia, Gilpin, 77; Wood v. The Brigantine Nimrod, Gilpin, 83.

<sup>1</sup> In *The Two Catherines*, 2 Mason, 319, Mr. Justice Story considered the right of compensation to be by way of salvage, and allowed a sum equal to the amount of wages to the time of process, the vessel not having reached her port, but the seamen having been discharged from further duty. See also *Cartwell v. Ship John Taylor*, 1 Newb. Adm. 341; *The Nippon*, U. S. C. C. Mass., 13 Law Rep. 266. This question was considered at length in the case of *The Neptune*, 1 Hagg. Adm. 227, and the right of the mariner to compensation was held to depend on his contract, and not upon salvage, or a *quantum meruit*. See also per *Sprague, J.*, in *The Massasoit*, 1 Sprague, 97. In *Flaherty v. Doane*, U. S. D. C. Mass., *Lowell, J.*, a libel *in personam* was filed for wages on a cod-fishing voyage. The vessel was lost on the voyage, and the wreck and some of the catchings were sold by the master. It was contended that, owing to the contract between the master and the owners, the latter were not liable for the wages of the crew. Assuming this to be true, Judge *Lowell* held the owners liable to the extent of the property saved. It was urged that as the property was not in the district, a suit *in rem* could not be maintained. *Lowell, J.*, said: "Granting for the purposes of this case that this argument is sound, yet by analogy I may well hold, that if the owners do not choose to bring the goods within the district, they are liable to the extent of the proceeds at the suit of the sailors who had a lien thereon. In salvage causes, this is the well-established doctrine. There will not ordinarily be a personal claim upon the owners unless they had received the property, but in that event they must respond to the salvors in a personal suit in the admiralty, for the value of the goods or so much thereof as the court may decree for the salvage service. Now whether sailors are considered as salvors strictly speaking or not, which has been a much mooted question, I am of opinion that they are so far salvors as to come within this equitable rule."

vessel as possible. If we term the compensation salvage, then the seamen must aid in preserving the property;<sup>1</sup> and they are entitled to compensation from the proceeds of the cargo, as well as from the ship and freight.<sup>2</sup> Whereas, if the compensation is to be given as wages, then, as the seamen have no claim on the cargo for wages, they are not entitled to compensation, although they save some of it.<sup>3</sup> But, on the other hand, they are entitled to compensation as wages if any part of the ship and freight is preserved, although they took no part in the preservation, if they were merely not requested to do anything. In other words, the contract of the seamen is not at an end, and if the owner chooses to employ other persons to save the wreck, and does not call on the seamen, their lien still continues;<sup>4</sup> and such would seem to be the case where the seamen are so much disabled by the disaster that they cannot render any assistance, and the wreck is saved by third parties.<sup>5</sup> On the whole, we prefer the construction which makes

<sup>1</sup> *Adams v. The Brig Sophia*, Gilpin, 77. It was held in this case not to be sufficient to sue on the shipping articles, but the court said that two things must occur, the saving of the property and its preservation by the services and exertions of the seamen; and that if the libel states the loss, it must go further and state the facts which give the right to recover notwithstanding the loss. It was also said to be sufficient if nothing was said in the libel concerning the loss.

<sup>2</sup> *Jurgenson v. The Snow Catharina Maria*, 2 Pet. Adm. 424; *The Dawn*, Daveis, 121; *Taylor v. The Ship Cato*, 1 Pet. Adm. 48; *Brackett v. The Hercules*, Gilpin, 184; *Dunnett v. Tomhagen*, 3 Johns. 154. In *The Dawn*, *supra*, it was held that where the seamen performed such a service in a foreign country, they were entitled to a sum sufficient to take them home.

<sup>3</sup> *Dunnett v. Tomhagen*, 3 Johns. 154; *The Lady Durham*, 3 Hagg. Adm. 196.

<sup>4</sup> *The Massasoit*, 1 Sprague, 97. The vessel in this case was wrecked at the mouth of Boston Harbor. The crew remained on the wreck till the next day, when they were taken off by a life-boat. The owners sent down an agent with a steamboat and men, who saved all of the wreck that was saved, the crew not being called upon to do any work, or furnished with any means of subsistence, and part of the time they were physically incapable of rendering any assistance. It was held that wages were due. See also *Bruce v. The Tackle*, etc., of the *Steamboat America*, 1 Newb. Adm. 195.

<sup>5</sup> See *The Massasoit*, cited in note *supra*. In *The Reliance*, 2 W. Rob. 119, it does not appear why the crew did not assist in saving the proceeds of the wreck, and the case seems to be decided on the broad ground that the crew have a lien on the proceeds of a wreck if saved by third persons. But in *Lewis v. The Elizabeth & Jane*, Ware, 41, where wages are considered to rest on principles of salvage, it was held that where a vessel was *bonâ fide* deserted at sea, and after-

the right of compensation an exception to the general rule that "freight is the mother of wages," to that which enables them to sue as salvors. It is, however, clear that if the contract of the seamen is at an end, they may sue as salvors. This subject we shall consider hereafter.

The maxim (that freight is the mother of wages) is also subject to the exception that if no freight is earned because the voyage is broken up on account of the fraud or wrongful act on the part of the master or owner, wages are still due.<sup>1</sup> If a vessel is let on shares to the master, the owners are not liable for the wages of the seamen,<sup>2</sup>

wards saved by third parties, the seamen were not entitled to their wages. See also *The Nippon*, U. S. C. C. Mass., 13 Law Rep. 266.

<sup>1</sup> *Hoyt v. Wildfire*, 3 Johns. 518, where the vessel was seized for carrying contraband goods. See also 1 Pet. Adm. 192, note; *The Neptune*, 1 Hagg. Adm. 227, 232. Or where the voyage is broken up by a seizure for a debt of the owner of the vessel. *Woolf v. Brig Oder*, 2 Pet. Adm. 261. In *Van Beuren v. Wilson*, 9 Cow. 158, the vessel was seized by civil process from the admiralty court in a foreign country, for the purpose of trying the right of property to the vessel. She was detained several months and then ordered to be restored. This was prevented by a mob, the captain was killed in the affray, and the vessel having become very much deteriorated by decay, was abandoned to the underwriters. The court held that either wages were due, or damages to the amount of his wages, on the ground that a seizure on civil process must be at the risk of the owners, and that they ought to have released the vessel and given security for its return. In *The Saratoga*, 2 Gallis. 164, 175, *Story, J.*, said: "If the voyage or freight be lost by the negligence, fraud, or misconduct of the owner or master, or voluntarily abandoned by them; if the owner have contracted for freight upon terms or contingencies differing from the general rules of maritime law; or if he have chartered his ship to take a freight at a foreign port, and none is to be earned on the outward voyage, in all these cases the mariners are entitled to wages, notwithstanding no freight has accrued." In *Oxnard v. Dean*, 10 Mass. 143, it was held that where a vessel on her homeward voyage was seized and condemned abroad for the breach of the revenue laws of a foreign country, the seamen, although not in fault, were not entitled to wages after the seizure; and it was stated, although the point was not decided, that a majority of the court were of the opinion that no wages were due after the completion of the outward voyage. See note to this case by Mr. Rand, in his edition, p. 151. This case does not seem to be in accordance with the cases cited *ante*, p. 59, n. 5, to which we refer, and we are inclined to doubt its correctness.

<sup>2</sup> *McCabe v. Doe*, 2 E. D. Smith, 64; *Giles v. Vigoreux*, 35 Maine, 300. In *Skolfield v. Potter*, Daveis, 392, there were peculiar circumstances which took the case out of the general rule. See also *Aspinwall v. Bartlett*, 8 Mass. 483; *Webb v. Peirce*, 1 Curtis, C. C. 104. In *Harding v. Souther*, 12 Cush. 307, the owners of a vessel engaged in the mackerel fishery were held liable for the wages of the

but the vessel is liable *in rem*.<sup>1</sup> So if the vessel is chartered.<sup>2</sup>

If what is saved from a wrecked vessel is brought home to the United States in another vessel, with the master and seamen, the ship bringing it home has a lien on it for the freight payable for bringing it, but not for the passage-money of the seamen.<sup>3</sup>

It has been said at common law,<sup>4</sup> that if the ship be not seaworthy at the outset of the voyage, and be abandoned for that reason before freight is earned, no wages are due. But this rule would subject the seaman to lose wages for his services for no fault of his own, but for that which generally is in fact the fault of the owner, and may almost always be supposed to be so, and which the seamen could not by labor or care have prevented. And we think that it would not now be considered as law in admiralty, if anywhere.<sup>5</sup>

It is held that the owner of a slave may sue for his wages;<sup>6</sup> and so may the master of an apprentice.<sup>7</sup> But if the slave escapes during the voyage, no responsibility for indemnity rests on master, owner, or crew, unless they assisted his flight and escape.<sup>8</sup>

As to the question how far and when seamen may be witnesses for each other, the prevailing, and we think the reasonable rule is, in admiralty as at common law, that seamen may be witnesses for

cook, although by the usage the cook's wages are deducted from the portion of the proceeds of the voyage apportioned to the master and crew.

<sup>1</sup> The Sloop *Cantou*, 1 Sprague, 437.

<sup>2</sup> The Sch. *Highlander*, 1 Sprague, 510.

<sup>3</sup> *Brackett v. The Hercules*, Gilpin, 184.

<sup>4</sup> *Eaken v. Thom*, 5 Esp. 6. See the remarks of *Kent*, C. J., on this case, in *Hoyt v. Wildfire*, 3 Johns. 518.

<sup>5</sup> *Hindman v. Shaw*, 2 Pet. Adm. 264, 266, supports the general principle, that, the voyage being broken up by the vessel not being seaworthy, the seamen are to have an allowance. But in this case, the seaman refused to proceed in another suitable ship, which had been provided. The court held this tantamount to desertion.

<sup>6</sup> *Stone v. Godet*, cited Bee, 95.

<sup>7</sup> *Eades v. Vandeput*, 5 East, 89, note.

<sup>8</sup> *Carey v. Schooner Kitty*, Bee, 255. In *Emerson v. Howland*, 1 Mason, 45, it was held that if a slave was illegally discharged abroad, his master might recover wages up to the time when he might have returned to the United States. The slave did not return, but no claim was made for his value.

each other in suits for wages, although they may have a common interest in sustaining each other's claims, and defeating the defences made against them.<sup>1</sup> It is always in the power of courts of admiralty at least to determine what weight shall be given to their testimony, and to make due allowance for all the circumstances which weaken its value. But the master has been held (on what seems to us questionable reasons) to be incompetent as a witness for the owner, in a suit against him or the ship for wages, because of his own direct responsibility and interest.<sup>2</sup> How-

<sup>1</sup> As the contract of seamen is several and not joint, they may be witnesses for each other where they are interested in the same question, if they are not directly interested in the event of the suit. *Spurr v. Pearson*, 1 Mason, 104; *Hoyt v. Wildfire*, 3 Johns. 518; *Powell v. The Betsey*, U. S. D. C. Penn., 2 Browne, 335, 350; *The Cypress*, Blatchf. & H. Adm. 83. Such evidence is, however, received with great caution and scrutiny. *The Steamboat Swallow*, Olcott, Adm. 4; *Graham v. Hoskins*, id. 224. It is said in a case in Pennsylvania that where the question is the loss of the ship, embezzlement, equally affecting the whole crew, negligence, misfeasance or malfeasance to which all must contribute in damages, one seaman cannot be a witness for another. *Thompson v. Ship Philadelphia*, 1 Pet. Adm. 210. In a simple case of embezzlement, however, where the seamen not in fault are not bound to contribute, this rule does not apply. *Spurr v. Pearson*, 1 Mason, 104. The general rule is the same both at common law and in admiralty, respecting the competency of witnesses. *The Schooner Boston*, 1 Sumner, 328, 343.

<sup>2</sup> Judge *Peters* constantly refused to admit the captain to testify in suits for seamen's wages. *Malone v. The Mary*, 1 Pet. Adm. 139, 141; *Jones v. The Brig Phoenix*, id. 201; *Atkins v. Burrows*, id. 244. The reason he gave was his interest in the result of the suit, he being responsible for the mariner's wages. This appears to have been the practice in Massachusetts, *Dunlap's Adm. Practice*, 245. But if the mariners have obtained their wages, even by the help of his testimony, from either the owners or the ship, that extinguishes *their* claim; and neither the ship nor the owners can have any claim against him, for he is not liable for seamen's wages except to seamen, and if they have got them from some one else, they cannot get them from him. And if it be said that he has an interest in preventing their recovering against the owners, because, if their judgment is unsatisfied they may turn on him, this seems to us too remote an interest to disqualify the master. This seems to be the view taken of it in *The Lady Ann*, Edw. Adm. 235, where Sir *Wm. Scott* says: "The mariner has his election whether he will proceed against the owners, the master, or the ship; and in this case, the proceedings being instituted against the owners, the master has no immediate interest in the suit, and therefore is not an incompetent witness by any rule with which I am acquainted." In *New York* the master is admitted as a witness on behalf of the owners. *The Steamboat Swallow*, Olcott, Adm. 4; *The Steamboat Hudson*, id. 396. In *Calloway v. Morris*, 3 Yeates, 445, the point was only

ever this may be, it would seem clear that where he is a party to the suit, or where he has intervened, put in a claim, and filed an answer to the libel, he is incompetent.<sup>1</sup> So he cannot testify to any matter of defence which originates in his own acts, for which he is himself responsible.<sup>2</sup> The master is, however, a competent witness on behalf of the seamen.<sup>3</sup> And charges made against seamen on the shipping papers require to be verified by the suppletory oath of the master.<sup>4</sup> Interest does not now, however, disqualify a witness.<sup>5</sup>

On a whaling voyage the owners of the vessel have no right to charge the seamen with commissions for disposing of the oil and bone, and settling the voyage, where this duty is assumed by the owners in the shipping contract.<sup>6</sup> Nor can the seamen be charged with money expended for labor in preparing the vessel for sea, unless it be shown that the seamen ought to have performed it, and being called on neglected to do so.<sup>7</sup> Nor are they liable for money paid an agent in the nature of a bounty for hiring them.<sup>8</sup> And where, before sailing on a whaling voyage, a seaman obtained certain outfits on credit, and gave to the outfitter an order on the owner, which the latter accepted and paid, and besides the personal liability of the seaman, held the proceeds of the voyage as security, and charged insurance on the amount paid, it was held that such raised in the argument. It was not decided. But a release from the owners was required. A release was procured from one, which the court ruled to be sufficient, declaring the point open to further discussion. In *Arnold v. Anderson*, 2 Yeates, 93, which was a suit for damages for the unskilful stowage of the cargo, the captain was admitted, on a release being given; the mate and mariners were admitted without any release.

<sup>1</sup> The Exchange, Blatchf. & H. Adm. 366.

<sup>2</sup> The William Harris, Ware, 367, 371. It was also held in this case that a master is not a proper person to prove the sufficiency of a medicine chest. The master under the general rule stated in the text is not competent to prove that a discharge of a seaman was justifiable. *Robinett v. The Ship Exeter*, 2 Rob. Adm. 261; *Atkyns v. Burrows*, 1 Pet. Adm. 244. In *The Hope*, 2 Gallis. 48, it was held that the master is not a competent witness in case of an information *in rem* for a forfeiture occasioned by his alleged misconduct.

<sup>3</sup> The Trial, Blatchf. & H. Adm. 94.

<sup>4</sup> The David Pratt, Ware, 495.

<sup>5</sup> See *post*, Book III., Chap. XI., Sect. 2.

<sup>6</sup> *Lovrein v. Thompson*, 1 Sprague, 355; *Hazard v. Howland*, 2 Sprague, 68.

<sup>7</sup> *Lovrein v. Thompson*, 1 Sprague, 355.

<sup>8</sup> *Lovrein v. Thompson*, 1 Sprague, 355.



a charge was not proper.<sup>1</sup> And the seamen are not liable for a charge of two and a half per cent guarantee commission on sales of oil, or for the charges for fitting and discharging the ship.<sup>2</sup> And if a seaman on a whaling voyage is discharged abroad, he is entitled to a settlement at home prices, and is not obliged to take it at consular prices.<sup>3</sup> The seamen are entitled to a settlement on a cash and not on a credit basis. If, therefore, the oil is sold on credit, the owner is not obliged to account to them for this, but only for the sum it would have brought if sold for cash.<sup>4</sup> By usage the owner cannot charge the seamen for the casks.<sup>5</sup>

If a part-owner sue for his lay as master, the other owners are entitled to deduct payments made to him and to his wife, when done with his consent, and are not obliged to wait until he has a settlement with them of his account as part-owner.<sup>6</sup>

If a seaman on a whaling voyage gives an order for the balance that may be due him on settlement of his voyage, intended as security for future advances by the payee, this constitutes an assignment of his wages although it is not accepted by the person on whom it is drawn. It is also irrevocable if advances are made upon it, and the assignor cannot maintain an action against the owners of the vessel for his wages.<sup>7</sup>

The subject of forfeiture of wages by desertion or other gross misconduct, will be considered hereafter.<sup>8</sup>

The legal tender act has given rise to several important and difficult questions. We give in our note the adjudications upon this subject relating to seamen's wages.<sup>9</sup>

<sup>1</sup> *Lovrein v. Thompson*, 1 Sprague, 355.

<sup>2</sup> *Bates v. Seabury*, 1 Sprague, 433.

<sup>3</sup> *Hathaway v. Jones*, 2 Sprague, 56.

<sup>4</sup> *Hazard v. Howland*, 2 Sprague, 68.

<sup>5</sup> *Hazard v. Howland*, 2 Sprague, 68.

<sup>6</sup> *Hazard v. Howland*, 2 Sprague, 68.

<sup>7</sup> *Tripp v. Brownell*, 12 Cush. 376.

<sup>8</sup> See *post*, p. 93.

<sup>9</sup> In *The Ship Rochambeau*, U. S. D. C. Maine, *Ware, J.*, 26 Law Rep. 564, the libellant shipped at St. John, N. B., for a voyage to London and back, not to exceed nine months in time, at the rate of twenty-five dollars a month, in New Brunswick currency. This voyage was made before the nine months expired, and the libellant continued in the vessel without any new agreement, and went on another voyage to London, which was to terminate in the United States. Payments were made from time to time during the voyage in specie. Held, that on the termination of the voyage in the United States the libellant

## SECTION IV.

## OF PROVISIONS.

Provisions of due quality and quantity are to be furnished by the owner under the general principles of law as applied to this particular contract.<sup>1</sup> It is also provided by statute in this country that every ship or vessel belonging to a citizen of the United States,

was entitled to recover the balance due in New Brunswick dollars, and a decree was entered for such a sum in United States currency as would make the payment equal to a payment in specie.

In *The Quintero*, U. S. D. C., Mass., 1866, *Lowell*, J., seamen shipped at Valparaiso, Chili, for a voyage to Boston. They were to be paid in dollars. *Lowell*, J., said: The contract was made in Chili, and an inference is said to arise from that circumstance that the crew were to be paid in Chilian dollars. But the contract is merely for dollars, and upon the aspect the case has assumed it is for dollars payable here, and the presumption must be that the place of performance of the contract is to be looked to in this particular. And whether the decree be strictly for wages or for damages in the nature of wages, it should be made up in our money."

In *The Nonpareil*, Brow. & L. Adm. 355, a seaman signed articles at New York to serve on board a British ship, on a voyage to terminate either in the United States or in the United Kingdom. The rate of wages was expressed in dollars. The voyage was terminated in Liverpool. At the time of making the contract the exchange value of the paper dollar was 2s. 8½d. It afterwards depreciated in value. The shipowners contended that they were only liable for the value at the time the contract was made. But upon evidence that for twenty-five years seamen discharged from American ships in London or Liverpool, had received their wages at the rate of 4s. 2d. a dollar, the court held that the parties contracted according to this usage, and the value of the dollar was held to be 4s. 2d.

In *The Annie Sherwood*, before Dr. *Lushington*, in 1865, 12 *Law Times*, N. S. 582, the voyage was from New York to Cuba, thence to Liverpool and back to Cuba or the West Indies, and thence to a port of discharge in the United States, the time not to exceed eight months. The articles provided that the seamen should be paid so many dollars a month, and contained a clause that the wages should be paid in United States currency or its equivalent. At the expiration of the eight months the vessel was in Liverpool. The court held that the seamen were entitled to have the dollar reckoned at 4s. 2d. The court was not satisfied that the condition in regard to United States currency had been explained to the men, and said, even if it had been, it was in clear violation of the custom to pay 4s. 2d., and would not receive any countenance or support.

<sup>1</sup> This has been the custom among maritime nations from the earliest times. *Pothier on Maritime Contracts*, n. 215 (Cushing's ed.) 131; *Consolato del Mare*, c. 100. See also 1 *Pardea* 335, 381, 483; 2 *id.* 510; *The Madonna D'Ibra*, 1 *Doda* 37; *Dixon v. The Cyrus*, 2 *Pet. Adm.* 407, 411.

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bound on a voyage across the Atlantic Ocean,<sup>1</sup> shall, at the time of leaving the last port from which she sails,<sup>2</sup> have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread for every person on board such vessel, besides such other provisions as may be put on board by the master or passengers, and in like proportion for shorter or longer voyages, and in case the crew of any vessel which shall not have been so provided shall be put on short allowance in water, flesh, or bread, during the voyage, the master or owner shall pay to each of the crew one day's wages beyond the wages agreed on, for every day they are so put on short allowance, to be recovered in the same manner as their stipulated wages.<sup>3</sup>

The seamen are also entitled, in addition to the statute allowance, to such subsistence as is usually furnished on voyages similar to that they are engaged in.<sup>4</sup>

If, however, the necessity of short allowance springs from a peril of the sea, or any accident of the voyage, or the delivery of a part of the provisions to another vessel in distress, the extra wages are not given.<sup>5</sup>

<sup>1</sup> Act of 1790, c. 29, § 9, 1 U. S. Stats. at Large, 131, 135. In *Gardner v. The Ship New Jersey*, 1 Pet. Adm. 223, the voyage was an entire one from Philadelphia to Canton, with liberty to go to other intermediate ports, and back to Philadelphia. It was contended that as some of the mariners shipped at foreign ports, they did not come within the statute. But the objection was overruled.

<sup>2</sup> See *The Mary Paulina*, 1 Sprague, 45.

<sup>3</sup> Under this statute it has been held that if less than the statute quantity of all the three articles be put on board, and there be a short allowance of all, triple extra wages are to be given for each day. *Collins v. Wheeler*, 1 Sprague, 188.

<sup>4</sup> *Foster v. Sampson*, 1 Sprague, 182; *Collins v. Wheeler*, 1 Sprague, 188.

<sup>5</sup> Though we are not aware of any case where this point has been expressly decided, yet it follows as a necessary deduction from the fact, that to enable the seaman to recover the extra wages, not only must he be put on short allowance, but it must be shown also that the vessel sailed without having on board the stores prescribed in the act. *The Ship Elizabeth v. Rickers*, 2 Paine, C. C. 291; *Ferrara v. The Barque Talent*, Crabbe, 216; *The Bark Childe Harold*, Olcott, Adm. 275. If the vessel sailed with the requisite quantity on board in good condition, but part was spoiled afterwards, so that the crew were put on short allowance, their remedy is by an action for the special damage done them, but they cannot claim extra wages. *The Bark Childe Harold*, Olcott, Adm. 275. If it is clearly proved that the crew were put upon short allowance, the burden is on the ship-owner to show that the vessel had the requisite provisions on board at the time of

It has been held that a deficiency in one kind of provisions is not compensated by an abundance in another; as a deficiency in bread by an excess of beef;<sup>1</sup> nor is it any excuse for a deficiency in bread that flour is given;<sup>2</sup> but it is clear that the master must have in every port a certain discretion in supplying wholesome and abundant food, of such kinds as can be most economically procured, if those specified in the act cannot be obtained by reasonable exertions.<sup>3</sup> But it is doubtful if it is any excuse under the statute that the article in which the deficiency occurred could not be procured.<sup>4</sup> The master must see to the expenditure of the provisions; he should guard against waste; and putting the crew on allowance is by no means the same thing as putting them on short allowance.<sup>5</sup>

sailing. *Piehl v. Balchen*, Olcott, Adm. 24, 31. In the *Bark Childe Harold*, Olcott, Adm. 275, 279, it was contended that the same rule applied where the libellant showed that bread of a bad and unwholesome quality had been served out to them. But the court held that the rule ought not to be extended to require the owner to give evidence of the quantity and quality of provisions stored on board, when the testimony of the libellants showed that there was an abundant supply in the ship, and only accused it of being unwholesome in quality when shipped.

<sup>1</sup> *The Mary Paulina*, 1 Sprague, 45; *Coleman v. Brig Harriet*, Bee, Adm. 80. In this latter case the captain left port with only ninety pounds of bread per man instead of one hundred, but there was a great overplus of meat and water. It was held that the seamen should receive one third of the amount of wages contracted for over and above their common wages. There were some special reasons, perhaps, in this case, which led the court to give only one third of the entire wages, but the rule is that although there be a deficiency in one kind of food, the entire double wages are due, and not merely one third. *The Mary Paulina*, 1 Sprague, 45.

<sup>2</sup> *Foster v. Sampson*, 1 Sprague, 182.

<sup>3</sup> *Mariners v. Ship Washington*, 1 Pet. Adm. 219. But in such a case the articles substituted must be a full equivalent both in quantity and quality for those required by law. *The Mary, Ware*, 454.

<sup>4</sup> This was held a defence in *Mariners v. Ship Washington*, 1 Pet. Adm. 219. But not in *Coleman v. Brig Harriet*, Bee, Adm. 80. See also *Foster v. Sampson*, 1 Sprague, 182.

<sup>5</sup> *McDonald v. Ship Cabot*, 1 Newb. Adm. 348. What is a proper allowance is to be determined by the navy ration. *Mariners v. Ship Washington*, 1 Pet. Adm. 219; *The Mary, Ware*, 353, 460; *The Mary Paulina*, 1 Sprague, 45; *Ship Elizabeth v. Rickers*, 2 Paine, C. C. 291, 288. In this case Mr. Justice *Thompson* said: "To subject the master or owners to the extra wages, the crew must be put upon short allowance; by which I should understand that there must be some

## SECTION V.

## OF THE SEAWORTHINESS OF THE SHIP.

So, too, the owner is bound to provide a seaworthy ship;<sup>1</sup> and our statutes provide the means of lawfully ascertaining her condition, on the complaint of the mate and a majority of the seamen, by a regular survey, at home or abroad.<sup>2</sup> The third section of

order or command to that effect given, or some gross negligence in the master. An accidental or unintentional deficiency in weight, would not subject the master or owner to the penalty." If extra wages are claimed, the answer must set forth precisely whether the vessel shipped the quantity and quality of provisions required by the statute. The *Elizabeth Frith*, 1 Blatchf. & H. Adm. 195. The navy ration is fixed by Acts of 1842, c. 267, 5 U. S. Stats. at Large, 546.

<sup>1</sup> In *Couch v. Steel*, 3 Ellis & B. 402, 24 Eng. L. & Eq. 77, an action was brought by a seaman to recover damages for injuries sustained in consequence of the vessel leaving port in an unseaworthy condition. There was no allegation that the owners knew the vessel was unseaworthy. On demurrer the court held that the plaintiff could not recover, as there was no implied warranty on the part of the owners that the ship should be seaworthy. This decision is clearly repugnant to the principles of the American authorities on this subject, independent of statute provisions. In the case of *Dixon v. Ship Cyrus*, 2 Pet. Adm. 407, 411, decided in 1789, it was held that both law and reason implied that at the commencement of the voyage the vessel should be seaworthy. See also *Rice v. Kitty*, id. 420. In the case of *The Ship Moslem*, Olcott, Adm. 289, the vessel put into Cape Town in a leaky condition. The libellants shipped there for the home voyage to New York. The condition of the vessel was known to them, and they shipped with the express notice that their services would be required in pumping out the vessel on her voyage. Yet it was held that if the vessel was actually unseaworthy when she sailed, that is, if she was unfit for the voyage, the libellants were not bound by their contract, and could rightfully refuse to continue their voyage, and compel the master to return to port. In *Eaken v. Thom*, 5 Esp. 6, it was held that where the ship sailed in an unseaworthy condition, and in consequence thereof the voyage was afterwards abandoned, no freight being earned, the seamen were not entitled to their wages. This case was doubted by *Kent*, C. J., in *Hoyt v. Wildfire*, 3 Johns. 518. As the voyage was lost by the default of the owner in sending the vessel to sea in such a condition, it seems clear that the wages should have been paid. See *Hindman v. Shaw*, 2 Pet. Adm. 264, 266.

<sup>2</sup> Act of July 20, 1790, c. 29, § 3, 1 U. S. Stats. at Large, 132; Act of July 20, 1840, c. 48, §§ 12, 13, 14, 5 U. S. Stats. at Large, 396. The former of these acts provides that if the mate or first officer under the captain, and a majority of the crew of any vessel bound on a voyage to a foreign port, shall, before the vessel has left the land, require the seaworthiness of the vessel to be inquired into, the

the statute of 1794, provides that the master shall pay the costs of the survey in the first instance, and if the complaint appears to have been without foundation, the costs and a reasonable sum for the detention shall be paid out of the wages of the crew. But it has been held that if there was reasonable cause for the survey, the owners cannot charge the expense to the seamen.<sup>1</sup> Seamen, after shipping, often refuse to proceed on the voyage; and if then arrested for the mutiny, the condition of the vessel, if that be their excuse, is inquired into by the court; and if she is found to be unseaworthy, their punishment is reduced and mitigated accordingly.<sup>2</sup>

master shall stop at the nearest port for the purpose of having such inquiry made. On the construction of this act, *Ware, J.*, remarked in the case of *The William Harris*, *Ware*, 367, 373, that the reason of the law applied as strongly to the case of a vessel departing from a foreign port on her return, as leaving her home port on a foreign voyage. This is now settled by the statute of 1840. By this act the consul, or commercial agent at the foreign port, is directed, on complaint being made in writing by any officer and a majority of the crew, to appoint two persons to inspect the vessel, etc. By the Act of 1850, c. 27, § 6, 9 U. S. Stats. at Large, 441, the Act of 1840 is so far amended, as to require the complaint to be signed by the first, or the second and third officers, and a majority of the crew. If the crew, instead of availing themselves of their statute remedy, suffer the owner to repair the vessel of his own accord, and he employs an agent who pronounces her seaworthy, they cannot refuse to proceed on the ground that the repairs are insufficient, if they are not so in fact. *Porter v. Andrews*, 9 Johns. 350.

<sup>1</sup> *The William Harris*, *Ware*, 367. The statute of 1840 provides that the expenses shall be deducted from the wages of the seamen, on the inspectors certifying that the complaint was made without good and sufficient cause.

<sup>2</sup> *United States v. Nye*, 2 Curtis, C. C. 225. Mr. Justice *Curtis* in this case said: "I think the correct rule is, that after the men have rendered themselves on board, pursuant to their contract, and before the voyage is begun, they may lawfully refuse to go to sea in the vessel, if they have reasonable cause to believe, and do believe, the vessel to be unseaworthy. But the presumption is that the vessel was seaworthy; and the seamen must prove that they acted in good faith, and upon reasonable grounds of belief that the ship was not in a fit condition to go to sea, by reason of unseaworthiness. If they prove this, they are justified in their refusal, and are not guilty of any offence." See also *United States v. Staly*, 1 Woodb. & M. 338; *Dixon v. The Ship Cyrus*, 2 Pet. Adm. 407. So unseaworthiness is a sufficient defence to the charge of endeavoring to commit a revolt by compelling the master to return to port. *United States v. Ashton*, 2 Sumner, 13. See also *The William Harris*, *Ware*, 367. In *The United States v. Givings*, 1 Sprague, 75, and in *The Hibernia*, id. 78, it was held that if seamen believe that a vessel is unseaworthy, and ask for a survey, they are not bound to go to sea in her till such request is granted, although the jury should incline to think that the

## SECTION VI.

## OF THE CARE OF SEAMEN IN SICKNESS.

Sickness is provided for by statute, so far as to require that every ship or vessel, belonging to a citizen of the United States, of the burden of one hundred and fifty tons or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the medicines shall be examined by the same or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine chest so provided and kept for use, the commander of such vessel shall provide and pay for all such advice, medicine, or attendance of physicians as any of the crew shall stand in need of in case of sickness, at every place where the vessel may touch or trade during the voyage, without any deduction from the wages of such sick seaman.<sup>1</sup>

This act has been extended to vessels of seventy-five tons, navigated by six or more persons in the whole, bound from the United States to any port in the West Indies.<sup>2</sup> By other statutes the master may deduct twenty cents a month from every seaman's wages, to make up a fund for the support of marine hospitals, in which every sailor may have medical treatment.<sup>3</sup> There is, how-

vessel was in fact seaworthy; and that if the masts are rotten and unfit for the voyage, the crew are not bound to go to sea, although the master makes a verbal promise that he will keep in certain latitudes and carry certain sail, for which the masts are sufficient.

<sup>1</sup> Act of 1790, c. 29, § 8, 1 U. S. Stats. at Large, 134.

<sup>2</sup> Act of 1805, c. 28, 2 U. S. Stats. at Large, 330.

<sup>3</sup> Act of 1798, c. 77, 1 U. S. Stats. at Large, 605; Act of 1799, c. 36, 1 U. S. Stats. at Large, 729; Act of 1802, c. 51, 2 U. S. Stats. at Large, 192; Act of 1811, c. 26, 2 U. S. Stats. at Large, 650; Act of 1843, c. 49, 5 U. S. Stats. at Large, 602; Act of 1846, c. 60, 9 U. S. Stats. at Large, 38; Act of 1864, c. 70, 13 U. S. Stats. at Large, 61. The Act of 1802, § 3, extends a similar provision to the case of boats, rafts, or flats, descending the Mississippi to New Orleans. In *Reed v. Canfield*, 1 Sumner, 195, 201, Mr. Justice Story said it seemed that these acts had been construed in practice not to impose upon ships and vessels in the whale and other fisheries, the payment of

ever, by the general law merchant, an obligation upon every ship-owner or master to provide for a seaman who becomes sick, or wounded, or maimed in the discharge of his duty, whether at home or abroad, at sea or on land,—if it be not by his own fault,<sup>1</sup>—suitable care, medicines, and medical treatment, including nursing, diet, and lodging.<sup>2</sup> At first it was held that the statute re-

hospital money. By the Act of March 1, 1843, c. 49, 5 U. S. Stats. at Large, 602, the provisions and penalties of the Act of 1798 are extended to registered vessels in the coasting-trade. Canal boats without masts or steam power are exempt, by the act of 1846, from the payment of hospital money, and are not entitled to the benefit from the hospital fund. By the act of 1864, if a vessel of the United States is sold in a foreign port, the consul, vice-consul, commercial agent, or vice-commercial agent of the United States within whose consulate or district such sale or transfer is made, or in whose hands the papers of the vessel are, is required to collect of the master or agent all moneys due under the act of 1798.

<sup>1</sup> In *Johnson v. Huckins*, 1 Sprague, 67, it was held that a seaman, during an illness occasioned by his own fault, was not entitled to wages, and was liable for the expenses of his subsistence, but not for the wages paid another man in his place, nor for the detention of the vessel for want of his services, it being in the power of the master to procure a substitute.

<sup>2</sup> Laws of Oleron, arts. 6, 7; Laws of Wisbuy, art. 19; Laws of the Hanse Towns, art. 39; Molloy, 243; L'Ord. de la Mar. liv. 3, tit. 4, art. 11; Valin, Com. tome 1, p. 721; Pothier on Maritime Contracts, n. 190, Cushing's translation, 115; Pothier, Us et Coust. de la Mer, p. 31; Harden v. Gordon, 2 Mason, 541; Walton v. The Ship Neptune, 1 Pet. Adm. 142; Hastings v. The Ship Happy Return, id. 253, 256, n.; The Forest, Ware, 420; The Brig George, 1 Sumner, 151; Reed v. Canfield, id. 197; Lamson v. Westcott, id. 591, Appen.; Crapo v. Allen, 1 Sprague, 184. Freeman v. Baker, Blatchf. & H. Adm. 372, 382; Nevitt v. Clarke, Olcott, Adm. 316; Croucher v. Oakman, 3 Allen, 185. In Reed v. Canfield, *supra*, it was held that if the seaman was injured while in the service of the ship, he was entitled to the expenses of his cure until it was completed, as far as the ordinary medical means extend, but that the owners were not liable for consequential damages. In Nevitt v. Clarke, Olcott, Adm. 316, it was held that the owners were only liable for expenses while the seaman was in their employ. See also *The Atlantic*, Abbott, Adm. 451, where this question is discussed at length. In Ringold v. Crocker, Abbott, Adm. 344, the seaman went on shore without leave, and on returning to the vessel, when asked by the mate why he went ashore, answered in an insolent manner, whereupon the mate struck him with a belaying-pin and injured him severely. The master was boarding on shore at the time, and when the seaman went to him he placed him in a house there, and directed a physician to attend him. Held, that the seaman was entitled to be cured if injured while in the service of the ship, and that he was to be deemed in the service while under the power and authority of the officers, and that an injury received in executing an improper order, or inflicted on him by



quiring a medicine-chest, substituted this requisition for the more general requirement of law; but it may be doubted whether this is so, in any degree; and it seems to be well settled that the general obligation of the law merchant remains in force, unless the medicine-chest is provided with medicines and means of medical treatment which the particular case requires, and there is sufficient skill on board to make a proper use of those medicines.<sup>1</sup>

the wrongful violence of an officer, would equally entitle him to this privilege. In *Brown v. Overton*, 1 Sprague, 462, a seaman was thrown from a yard while reefing a topsail, and broke both legs below the knees. The vessel was on a voyage from Calcutta to Boston, and at the time of the accident was twenty-five days' sail from St. Helena. This island was passed about forty miles distant. A suit was brought against the master, and the grounds of complaint were, that he did not put into St. Helena, that there was want of proper care and attention during the passage, and neglect after arriving at Boston. The libellant recovered damages on all these grounds. See, however, *Organ v. Brodie*, 10 Exch. 449.

<sup>1</sup> If, from the nature of the disease or from other circumstances, there is no person on board by whom the medicines can be safely administered under the printed medical directions accompanying the chest, the attendance of a physician will be a charge on the owners. *The Forest, Ware*, 420. Cases requiring extraordinary assistance, such as surgical aid, which the medicine-chest cannot supply, are not within the spirit of the statute, which it seems "is limited to the ordinary cases of illness on board the ship; a sickness of such a character that the patient may be and is kept on board, and receives or may receive the benefit of the medicine-chest and directions, and the advice and assistance of the master of the ship, or some other competent person attached to the ship, in the application of the medical directions accompanying the chest, and such nursing and attendance as the situation of the ship may admit." Per *Davis, J.*, in *Lamson v. Westcott*, 1 Sumner, 591, 595, App. See also the remarks of *Peters, J.*, in *Hastings v. The Happy Return*, 3 Pet. Adm. 253, 256, n.; and the case of *Reed v. Canfield*, 1 Sumner, 195, where a seaman whose feet had been frozen in the service of the ship, so that partial amputation became necessary, was allowed to recover the expenses of his care from the owners under the general maritime law. The charge for nursing and attendance is not affected by the act. *Story, J.*, in *Harden v. Gordon*, 2 Mason, 541. The burden of proof, as to the sufficiency of the medicine-chest, is always upon the owner. *The Forest, Ware*, 420; *The Nimrod*, id. 9; *Harden v. Gordon*, *supra*; *Freeman v. Baker*, Blatchf. & H. Adm. 372, 382; *The William Harris, Ware*, 367, 375. It was also held in this case that the captain is not a proper person to prove the sufficiency of the medicine-chest, but the testimony of some reputable physician, who has examined it, is requisite. In *Knight v. Parsons*, 1 Sprague, 279, one of the crew of a mackerel vessel was taken sick, and went on shore and bought medicine, and consulted a physician. Afterwards, being worse, he was put on shore at his own request, and did not return to the vessel. There was no medicine-chest on board. It

Where that is the case, a seaman has no right to demand to be taken on shore for better medical treatment, or to have a physician from on shore sent for; and if such demand is complied with, the expenses may be charged to the seaman.<sup>1</sup> This right of care extends to the officers of the ship, including the master.<sup>2</sup> If a seaman be put on shore for the safety of the crew, his disease being contagious, then, of course, the whole expense falls on the ship.<sup>3</sup> Where a seaman, who was too sick to perform labor, left the vessel without permission after her arrival, but before the cargo was discharged, it was held that wages were due to the time of leaving, and that no deduction should be made from the amount due, on account of his leaving the vessel.<sup>4</sup>

was held that he was entitled to recover all these expenses, although evidence of a usage was shown to the effect that fishermen in mackerel vessels were cured at their own expense in case of sickness.

<sup>1</sup> *Holmes v. Hutchinson*, Gilpin, 447. And it has been held that the rule is the same, whatever may be the nature of the disease; even if it be of a violent and dangerous kind, and the physician was sent for without the request of the seaman. *Pray v. Stinson*, 21 Maine, 402. But this is certainly at variance with the authorities cited in the preceding notes.

<sup>2</sup> In *The Brig George*, 1 Sumner, 151, the owners were held liable for the expenses incurred on account of the sickness of the mate while acting as master, and *Story, J.*, expressed the opinion that the rule extended to all officers as well as to the men. In *Winthrop v. Carleton*, 12 Mass. 4, the master of a vessel, while in port, was taken sick with the smallpox and went to a boarding-house, where he died. The consignee paid the board, the physician's bills, and the funeral expenses, and brought this action to recover back the money so paid. The owner of the ship was held liable, a usage being shown that it was customary for the consignee to pay such charges, and look to the owners.

<sup>3</sup> *Harden v. Gordon*, 2 Mason, 541; *Walton v. The Neptune*, 1 Pet. Adm. 142, 152; *Hastings v. The Happy Return*, id. 253, 256, n.; *The Forest*, Ware, 420; *The Brig George*, 1 Sumner, 151. But, *semble*, not when the seaman is removed at his own request from a vessel properly provided in all respects. *Pierce v. Paton*, Gilpin, 436. See also *Pray v. Stinson*, 21 Maine, 402. But in *Johnson v. Doubty*, 1 Ashm. 165, it was held that a seaman, who, when sick with the yellow fever, was asked whether he would stay on board or go to the hospital, chose the latter, was entitled to full wages, on the ground that it was the duty of the master to send him ashore at all events. See also *The Atlantic*, Abbott, Adm. 451, 477.

<sup>4</sup> *Francis v. Bassett*, 1 Sprague, 16.

## SECTION VII.

## OF THE RETURN OF SEAMEN TO THIS COUNTRY.

The right of the sailor to be brought back to his home, is very jealously guarded by our laws. Every ship must be provided with the shipping articles and a shipping list, verified under the oath of the master;<sup>1</sup> this he is required to present to the consul or commercial agent of the United States, at every foreign port which he visits, when so requested,<sup>2</sup> and is under bond to deliver to the boarding officer who comes on board his ship at the first home port which he reaches, and to produce the persons named therein,<sup>3</sup> that it may be ascertained that he has his whole crew on board. If it appears that any of them are missing, he must account for their absence.<sup>4</sup> If he discharges any of them abroad, with his or their own consent, he must pay to the American consul of the port, or the commercial agent, over and above the wages then due, three months' wages, of which two thirds are paid to the seaman, and one third retained by the consul and remitted to the treasury of the United States, to form a fund for the maintenance of American seamen abroad and for bringing them home.<sup>5</sup>

<sup>1</sup> Act of 1803, c. 9, § 1, 2 U. S. Stats. at Large, 203.

<sup>2</sup> The Act of 1840, c. 48, § 3, 5 U. S. Stats. at Large, 395, requires the master to produce the list above mentioned to the consul or other commercial agent, "whenever he may deem their contents necessary to enable him to discharge the duties imposed upon him by law toward any mariner applying to him for his aid or assistance."

<sup>3</sup> Act of 1803, c. 9, § 1, 2 U. S. Stats. at Large, 203.

<sup>4</sup> The bond is not forfeited, however, if any of the persons not produced have been discharged in a foreign country with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent there residing, and such consent is signified in writing under his hand and official seal, and produced to the collector with the rest of the crew, nor if any such persons have died or absconded, or have been forcibly impressed into other service, of which satisfactory proof shall be then exhibited to the collector. Act of 1804, c. 9, § 1. Under this section it has been held that the certificate of the consul must state that the seamen were left in the foreign port with their consent, and a certificate that they were left in a hospital unable to return, and that the master had paid for their maintenance, and left the amount of their wages, was held insufficient, and parol evidence of the consent of the consul or seamen was not admitted. *United States v. Hatch*, 1 Paine, C. C. 336.

<sup>5</sup> Act of 1803, c. 9, § 3, 2 U. S. Stats. at Large, 203. If a seaman is left in a

If the discharge is caused by any disaster which breaks up the voyage, so that the ship cannot be repaired and the voyage resumed in a reasonable time and at a reasonable cost, the above requirement does not apply to it.<sup>1</sup> And it is now provided by

foreign port, and the vessel is subsequently sold, it is doubtful if he can recover the extra wages allowed by this act in the case of sale. *Nevitt v. Clarke, Olcott, Adm. 316.* The act of 1840, c. 48, § 5, 5 U. S. Stats. at Large, 395, allows a consul, upon the application of both the master and any mariner under him, to discharge such mariner, if he thinks it expedient, without requiring the payment of three months' wages. And it seems that the certificate of the consul that the seaman was discharged with his own consent, is conclusive of the fact unless fraud on the part of the consul is shown. *Lamb v. Briard, Abbott, Adm. 367.* But the certificate must show on what ground the consul proceeded, and it is not enough for him to certify that he gave the discharge "lawfully," or that he gave it "in accordance with the law of the United States," but it must set forth that the discharge was made on the application of the master and the mariner, or on that of the mariner alone. And to entitle it to the respect accorded to documents under an official signature and seal, the signature must be legible, and the impression of the seal sufficiently distinct to allow the vignette and motto to be distinguished. *The Atlantic, Abbott, Adm. 451.* And to avail the owner in a suit brought against him for the two months' wages, it must appear that the consul personally made an official entry of his act both upon the list of the crew, and upon the shipping articles. *Miner v. Harbeck, Abbott, Adm. 546.* Where a vessel is sold, the seaman is entitled to his wages up to the actual sale of the vessel, and not merely to the time of the advertisement of such sale. *Lang v. Holbrook, Crabbe, 179.* The Act of 1856, c. 127, § 26, 11 U. S. Stats. at Large, 62, makes it obligatory upon the consul, upon the application of any seaman or mariner for a discharge, if it appear that he is entitled to it under any act of Congress, or according to the general principles or usages of maritime law, as recognized in the United States, to discharge him, and to require the three months' extra wages, as provided in the Act of 1803, c. 9, and the master shall pay this in all cases, unless the consul shall be satisfied that the contract has expired, or the voyage been protracted by circumstances beyond the control of the master, without any design to violate the articles of shipment, in which case if he deems it just he may discharge the mariner without exacting the additional pay. The three months' wages are to be held by the consul for the same purposes as provided in the act of 1803, and if the consul neglects to require the payment of, and to collect the said wages, he shall be answerable to the United States, and to the seaman, respectively, for their shares of such wages.

<sup>1</sup> *The Dawn, Ware, 485, Daveis, 121; Henop v. Tucker, 2 Paine, C. C. 151; The Saratoga, 2 Gallis. 164, 181.* See *Dodge v. Union Ins. Co. 17 Mass. 471.* In *Brown v. The Independence, Crabbe, 54,* it was held, where a seaman was injured by the mate, and the police authorities of the place took him on shore to the hospital without his request and against the will of the master, who also wanted to take him away with him when he left, that the seaman was not entitled to the benefit of the Act of 1803.

statute "that in cases of wrecked or stranded ships or vessels condemned as unfit for service, no payment of extra wages shall be required."<sup>1</sup>

The ship must be repaired,<sup>2</sup> or if captured, all proper means used to obtain restoration, and the seamen may hold on, a reasonable time, for this purpose. And if discharged before, they may claim their extra wages.<sup>3</sup> Our consuls and commercial agents may authorize the discharge of a seaman for good cause, but this must be disobedience, or misconduct, or disability by his own fault, of an extreme degree.<sup>4</sup> If the stipulations of the shipping articles

<sup>1</sup> Act of 1856, c. 127, § 26, 11 U. S. Stats. at Large, 62. In *Hoffman v. Yarrington*, U. S. D. C. Mass. *Lowell*, J., speaking of this statute said: "This statute appears to me to modify the law of 1803, as construed by the courts, and to except cases where the voyage is in good faith broken up by reason of the unseaworthiness of the vessel, from whatever cause arising, from the operation of the rule. It does not authorize or require me to go into the question of overruling necessity, but merely of good faith, as I apprehend, or at most to inquire whether the conduct of the master was such as a prudent man would have followed in like circumstances. . . . There is much reason to believe that she (the vessel) was old and rotten, and totally unfit to keep the seas. If so, the statute provision is operative, for, as I have said, it is no part of the requirement of that proviso that the unfitness should have been caused by a sea peril occurring in that particular voyage." It was also held that the owners were not liable for the expenses of the seamen home, where the vessel was sold in a foreign port on account of her unseaworthiness.

<sup>2</sup> *Pool v. Welsh*, Gilpin, 193; *The Dawn*, Ware, 485. In *Wells v. Meldrum*, Blatchf. & H. Adm. 342, it was held that where a vessel was condemned in a foreign port as unseaworthy, and sold on that account, and the voyage relinquished, the seamen were entitled to their extra wages under the act. *Betts*, J., states the reasons of the decision as follows: "The necessity for the sale, in this instance, for unseaworthiness, was not the result of any casualty to the vessel; nor was the sale compulsory, under any coercion, judicial or administrative, at the foreign port, so as to take away the discretion and free action of the master. There is no proof that the vessel was even irreparable, or that the unseaworthiness was more than the result of the natural wear of the ship on her voyage, or of her imperfect condition when sent to sea."

<sup>3</sup> *The Saratoga*, 2 Gallis. 164; *Emerson v. Howland*, 1 Mason, 45.

<sup>4</sup> Under the Act of 1803, c. 9, § 1, 2 U. S. Stats. at Large, 203, a discharge of a seaman in a foreign port, in order to justify a master for not producing him on the return of the vessel, must have been "with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent, there residing, signified in writing under his hand and official seal." In regard to what degree of misconduct will justify the master in putting an end to the contract with seamen, see cases *infra*. In *Hutchinson v. Coombs*, Ware, 65, 70, *Ware*, J., after admitting

are violated by the master,<sup>1</sup> if the vessel be unseaworthy,<sup>2</sup> or the seaman subjected to cruel treatment, he may be discharged by the consul or commercial agent, and his three months' wages allowed him, as if it were a voluntary discharge by the master. And this even if the sailor has deserted the ship by reason of such cruelty.<sup>3</sup>

Consuls may also send home our seamen in other ships, which are bound to take them, for a compensation not exceeding ten dollars for each man, and the sailor so sent is bound to work and obey as if he had originally shipped in that vessel.<sup>4</sup> If a master discharges a seaman against his consent and without good cause,

that, by the marine law, a master could, in certain cases, turn a mariner out of the vessel, said: "But this he cannot do for slight or venial offences, and certainly not for a single offence, unless of a very aggravated character. The cases stated, in which a master is permitted to discharge a seaman are, when he is incorrigibly disobedient, and will not submit to do his duty, *Thorne v. White*, 1 Pet. Adm. 168, 175; or if he is mutinous and rebellious, and persists in such conduct, *Relf v. The Maria*, 1 Pet. Adm. 186; or guilty of gross dishonesty, as embezzlement or theft, *Black v. The Louisiana*, 2 Pet. Adm. 268; or if he is an habitual drunkard, a stirrer up of quarrels and broils, to the destruction of the discipline of the crew; or by his own fault renders himself incapable of performing his duty." In *Nieto v. Clark*, U. S. D. C. Mass. Boston Courier, March 23, 1858, it was held that the master was justified in discharging a seaman who entered the state-room of a lady passenger, and conducted himself there in a grossly indecent manner. This case was affirmed, 1 Clifford, C. C. 145. See also *Orne v. Townsend*, 4 Mason, 541, 548; *Whitton v. The Brig Commerce*, 1 Pet. Adm. 160, 164; *Atkins v. Burrows*, id. 244, 248. The *Nimrod*, Ware, 9. If the seaman is taken from a vessel in a foreign port and sent home for a crime, his contract with the vessel is at an end, and he cannot recover any wages subsequently accruing. *Smith v. Treat*, Daveis, 266. So if the seaman is sent home by the consul. *Tingle v. Tucker*, Abbott, Adm. 519.

<sup>1</sup> Act of 1840, c. 48, § 9, 5 U. S. Stats. at Large, 395.

<sup>2</sup> Act of 1840, c. 48, § 14.

<sup>3</sup> Act of 1840, c. 48, § 17.

<sup>4</sup> Act of 1803, c. 9, § 4, 2 U. S. Stats. at Large, 204. This act provides a penalty of one hundred dollars, in case any master refuses to bring home destitute seamen. In *Matthews v. Offley*, 3 Sumner, 115, it was held that an action for this penalty must be brought in the name of the government. It was also held in this case, that if the seaman deserted from an American ship, and she was in port at the time he became destitute, the consul might require another American vessel to bring him home. It was also held that foreigners, while employed as seamen on American ships, are entitled to the privileges of the act; and that the certificate of the consul is *prima facie* evidence of all the facts stated in the enacting clause of the section, which are necessary to bring the case within the penalty.

in a foreign port, he is liable to a fine of five hundred dollars or six months' imprisonment. And the seaman may recover, besides, full indemnity for his time lost or expenses incurred by reason of such discharge.<sup>1</sup>

## SECTION VIII.

### OF THE DISOBEDIENCE OF SEAMEN.

Disobedience or misconduct of a sailor is, of necessity, punishable with great severity, because discipline must be preserved, as without it the ship would always be in great peril, and no voyage could be successfully conducted.<sup>2</sup> But incompetency to perform

<sup>1</sup> See *ante*, section on Wages.

<sup>2</sup> *Thorne v. White*, 1 Pet. Adm. 168; *Gardner v. Bibbins*, Blatchf. & H. Adm. 356; *The Elizabeth Frith*, id. 195, 208; *The United States v. Wickham*, 1 Wash. C. C. 316; *Jordan v. Williams*, 1 Curtis, C. C. 69; *United States v. Smith*, 3 Wash. C. C. 525; *Michelson v. Denison*, 3 Day, 294; *United States v. Freeman*, 4 Mason, 505, 512; *Carleton v. Davis*, Daveis, 221; *Turner's case*, Ware, 83; *United States v. Peterson*, 1 Woodb. & M. 305; *Fuller v. Colby*, 3 id. 1; *United States v. Borden*, 1 Sprague, 374. See also cases *infra*. In *Sheridan v. Furbur*, Blatchf. & H. Adm. 423, it was held that general orders from one officer would not excuse disobedience to the specific orders of another.

A hammer is an improper weapon to strike a seaman with, nor is it any excuse that the weapon was casually in the hands of the captain, and that he used it in a moment of excitement, and under circumstances which would have justified some punishment. *Saunders v. Buckup*, Blatchf. & H. Adm. 264. So a sword is an improper weapon to strike a seaman with, but a bucket of water thrown over a person to make him move quicker has been held to be no severe punishment, especially in the month of August. *Schelter v. York*, Crabbe, 449. And it has been held in the same court, that a blow with a dirty frying-pan, or wiping a dirty knife on the face of the person whose duty it was to keep these articles clean, is not a very aggravated or cruel assault. *Forbes v. Parsons*, Crabbe, 283. See also *Benton v. Whitney*, id. 417. A belaying-pin is an improper instrument for punishment. *Carleton v. Davis*, Daveis, 221; *Shorey v. Rennell*, 1 Sprague, 407; *Ringold v. Crocker*, Abbott, Adm. 344; so is a log of firewood. *Brown v. The Independence*, Crabbe, 54. But if a person is indicted for committing an assault with a dangerous weapon, it is a question for the jury, and not for the court, whether the instrument used was a dangerous weapon. *United States v. Small*, 2 Curtis, C. C. 241. In *Jarvis v. Sherwood*, Bee, Adm. 248, it is held that a cutlass should only be used when a mutiny exists or is threatened, but moderate correction with the fist is justifiable. This case also decides that a captain who

the duties of the station for which an officer or seaman has shipped, is no justification for the infliction of punishment.<sup>1</sup> Formerly there was no specific limit to the right of punishment. It might be administered by the master in any form, and in any measure, he always being answerable for his excess or cruelty, both criminally<sup>2</sup> and in damages to the seaman.<sup>3</sup> But if the mate, in obedience to the commands of the master, assists him in punishing a seaman, he will not be answerable as a joint trespasser, unless the punish-

encourages disorderly conduct in his men, is the less excusable for inflicting unusual punishment for conduct arising in some measure out of that. It is no justification for an assault that the person assaulted when told by the captain not to swear, retorted that he had heard him swear, and repeated the language. *Morris v. Cornell*, 1 Sprague, 62. In *Roberts v. Eldridge*, 1 Sprague, 54, it was held that the master of a vessel may use a deadly weapon when necessary, in order to suppress a mutiny, and that a mutineer although injured thereby can maintain no action for damages. *S. P. United States v. Colby*, 1 Sprague, 119; *United States v. Lunt*, 1 Sprague, 311.

<sup>1</sup> *Payne v. Allen*, 1 Sprague, 304.

<sup>2</sup> Acts of 1825, ch. 65, § 22, 4 U. S. Stats. at Large, 122; Act of 1835, ch. 40, § 3, 4 U. S. Stats. at Large, 776. For decisions under the former of these acts, see *United States v. Grush*, 5 Mason, 290; *United States v. Hunt*, 2 Story, 120. In *United States v. Cutler*, 1 Curtis, C. C. 501, the master was indicted under the Act of 1835, for beating one of his crew with malice and without justifiable cause. *Curtis, J.*, said: "The government must prove: 1, the beating; 2, the want of justifiable cause; 3, malice." See also *United States v. Alden*, 1 Sprague, 95; *United States v. Winn*, 3 Sumner, 209; *United States v. Small*, 2 Curtis, C. C. 241. Although flogging is now abolished, yet it is not a cruel and unusual punishment, within the meaning of the third section of the Act of 1835. *United States v. Collins*, 2 Curtis, C. C. 194.

<sup>3</sup> In *Forbes v. Parsons*, Crabbe, 282, it was held that a seaman is, in general, entitled to recover damages for an assault from the master, first, where personal violence is inflicted, not excessively, but wantonly, and without provocation or cause; second, where there was provocation and cause, but the punishment was cruel, or excessive; third, where the punishment is inflicted with a dangerous weapon. See also *The Agincourt*, 1 Hagg. Adm. 271; *Watson v. Christie*, 2 B. & P. 224; *Shorey v. Rennell*, 1 Sprague, 407; *Brown v. Howard*, 14 Johns. 119; *Sampson v. Smith*, 15 Mass. 365; *Rice v. The Polly & Kitty*, 2 Pet. Adm. 420; *Roberts v. Dallas*, Bee, Adm. 239; *Jarvis v. Sherwood*, Bee, 248; *Jenks v. Lewis*, Ware, 51, 3 Mason, 503; *Elwell v. Martin*, Ware, 53; *Butler v. McLellan*, id. 219; *Hutson v. Jordan*, id. 385; *Polydore v. Prince*, id. 402; *Bangs v. Little*, id. 506; *Pettingill v. Dinsmore*, Daveis, 208; *Thomas v. Lane*, 2 Sumner, 1; *Morris v. Cornell*, 1 Sprague, 62; *Whitney v. Eager*, Crabbe, 422; *Sheridan v. Furbur*, Blatchf. & H. Adm. 423; *Knowlton v. Boss*, 1 Sprague, 163; *Jones v. Sears*, 2 Sprague, 43.



ment is obviously and grossly excessive and unjust.<sup>1</sup> Seamen have a right to the protection of the master against illegal violence from the other officers of the vessel, and he is bound to hear their complaints and prevent a repetition of their wrongs.<sup>2</sup> If, therefore, seamen are illegally treated by the mate, and the captain refuses to hear their complaints, and the ship is in port and safely moored, the seamen are entitled to their discharge.<sup>3</sup> It has also been held that no one but the highest officer on board can inflict punishment for a past offence for the purpose of reformation or example.<sup>4</sup> Now, however, flogging is abolished and prohibited by law.<sup>5</sup> This has been declared, by very high authority, to include the use of the cat, and every similar form of punishment; but not necessarily to include all corporal punishment, such as a blow with the hand, or a stick, or rope;<sup>6</sup> and in a

<sup>1</sup> *Butler v. McLellan*, Ware, 219; *Sheridan v. Furbur*, Blatchf. & H. Adm. 423.

<sup>2</sup> See *Hathaway v. Jones*, 2 Sprague, 56.

<sup>3</sup> *Shorey v. Rennell*, 1 Sprague, 407.

<sup>4</sup> *Ibid.*

<sup>5</sup> Act of 1850, c. 80, 9 U. S. Stats. at Large, 515, contains the following clause: "Provided, That flogging in the navy, and on board vessels of commerce, be and the same is hereby abolished, from and after the passage of this act." Mr. Justice *Curtis*, in a charge to the grand jury, delivered at Providence, R. I., November 15, 1853, instructed them that the words "vessels of commerce," in the above statute, included vessels engaged in the whale and other fisheries. 1 *Curtis*, C. C. 509. So held also in *United States v. Cutler*, 1 *Curtis*, C. C. 501; *Payne v. Allen*, 1 *Sprague*, 304. The Act of 1850 is not a penal law, and no indictment can be framed upon it. But it has an important bearing upon the Act of 1835, in regard to the question of justifiable cause and malice. *United States v. Cutler*, *supra*. In a case decided by Judge *Sprague*, in the District Court of the United States for the Massachusetts District, February, 1857, Captain Lendholm of the ship *Josephine* was charged with maltreating his crew of *Lascars*. The court held that although the captain was apparently honest in the belief that the men had conspired to poison him, yet he had no right to flog them.

<sup>6</sup> Charge to the Grand Jury, 1 *Curtis*, C. C. 509. In the *United States v. Cutler*, 1 *Curtis*, C. C. 501, the master of a vessel was indicted under the Act of 1835, for beating one of his crew maliciously and without justifiable cause. The master had punished the seaman by inflicting six blows upon him with a piece of ratlin stuff. Mr. Justice *Curtis* said: "If the punishment inflicted was the punishment of flogging, within the meaning of the Act of 1850, there could be no justifiable cause, the authority of the master to punish by flogging being taken away. And it is for the jury to find whether what was done amounted to the punishment of flogging abolished by that act. In order to decide this question, it

case tried in Boston in the Common Pleas, February, 1854, it was held, on what seem to us to be good reasons, that the statute was intended to apply to deliberate flogging by way of punishment, and not to a blow or blows of any kind inflicted upon an emergency to produce immediate obedience.<sup>1</sup> Generally the only punishments which can now be resorted to, to enforce obedience and good conduct, are forfeiture of wages,<sup>2</sup> irons,<sup>3</sup> confinement on board,<sup>4</sup> imprisonment on shore,<sup>5</sup> hard la-

is necessary for the jury to attend to what is the punishment of flogging referred to in that law; and my instruction is, that it is corporal punishment by stripes inflicted with a cat, or any punishment which, in substance and effect, amounts thereto. The particular form of the instrument is not material; what you must look to is the effect produced. If the man was punished by stripes inflicted with a rope, and this, in substance and effect, is the same kind of punishment as the punishment of flogging with a cat, then it is prohibited by this law. The degree of severity of the punishment is not material. It is the kind, and not the degree, of punishment which is important. It may be that one blow with a cat would inflict stripes more painful to be borne, than one blow with a piece of ratlin stuff. But this is not material, if both are corporal punishment by stripes, and both are in substance the same kind of punishment."

<sup>1</sup> And *Sprague, J.*, in the case of *Shorey v. Rennell*, 1 *Sprague*, 407, said: "Any officer may use violence when necessary to coerce the performance of a duty, when an exigency requires instant obedience." And in *United States v. Alden*, 1 *Sprague*, 95, the same judge ruled "that there might be extreme cases, as of mutiny, where the master might resort to extreme measures, even to the taking of life."

<sup>2</sup> *Relf v. Ship Maria*, 1 *Pet. Adm.* 186; *Atkyns v. Burrows*, id. 244; *Thorne v. White*, id. 168; *Buck v. Lane*, 12 *S. & R.* 266.

<sup>3</sup> *Turner's Case*, *Ware*, 83; *Macomber v. Thompson*, 1 *Sumner*, 384, 389; *Sampson v. Smith*, 15 *Mass.* 365, 369; *Shorey v. Rennell*, 1 *Sprague*, 407.

<sup>4</sup> In *United States v. Alden*, 1 *Sprague*, 95, the defendant was indicted under the U. S. Statute of March 3, 1835, sec. 3, for imprisoning, "from malice, hatred, and revenge, and without justifiable cause," one of the seamen. It appeared that the seaman deserted, was retaken, and was first put in irons, and in a day or two taken out and informed that if he would not do duty he should be put in the run. The seaman refused to do duty, and objected to the run as an improper place of imprisonment. He was put in the run and remained there for five months, and persisted in refusing to return to duty. *Sprague, J.*, ruled that if the imprisonment was such from its nature and duration as was likely to be permanently injurious to the health or constitution of the seaman, it was not justifiable.

<sup>5</sup> Under some circumstances the master may imprison the seamen on shore. *United States v. Ruggles*, 5 *Mason*, 192; *Relf v. Ship Maria*, 1 *Pet. Adm.* 186; *Wood v. The Nimrod*, *Gilpin*, 83, 89. But, as is said by Judge *Hopkinson*, in *Wilson v. The Mary*, *Gilpin*, 31, 32, "The practice of imprisoning disobedient

bor,<sup>1</sup> or such other means as may be invented to take the place of flogging. In connection with this subject we will consider

and refractory seamen in foreign jails is one of doubtful legality. It is certainly to be justified only by a strong case of necessity. It is not among the ordinary means of discipline put into the hands of the master. I am inclined to think there should be danger in keeping the offender on board, or some great crime committed when this extreme measure is resorted to. It should be used as one of safety rather than discipline, and never applied as a punishment for past misconduct. The powers given by the law to the master, to preserve the discipline of his ship, and compel obedience to his authority, are so strong and full, that they can seldom fail of their effect; they should be clearly insufficient, before we should allow the exercise of a power which may so easily be made an instrument of cruelty and oppression, and may be so terrible in its consequences." See also *Thorne v. White*, 1 Pet. Adm. 168, 175, note; *Magee v. The Moss*, Gilpin, 219; *The Nimrod*, Ware, 9, 18; *The William Harris*, id. 367; *The David Pratt*, id. 496, 503; *Jay v. Almy*, 1 Woodb. & M. 262; *Jones v. Sears*, 2 Sprague, 43; *Wope v. Hemenway*, 1 Sprague, 300, affirmed, *Snow v. Wope*, 2 Curtis, C. C. 301; *Johnson v. Ship Coriolanus*, Crabbe, 239; *Gardner v. Bibbins*, Blatchf. & H. Adm. 356; *Buddington v. Smith*, 13 Conn. 334. "When even a master of a ship thinks it necessary to cause any of his crew to be confined in a foreign jail, he ought to pay some regard to their condition and treatment there, and should from personal examination, or at least through a reliable agent, see that they are such as humanity requires." Per *Sprague, J.*, *Shorey v. Rennell*, 1 Sprague, 411. If a seaman is imprisoned by the authorities of a foreign country for the violation of its laws, the costs and charges may be deducted from his wages. *Magee v. The Moss*, Gilpin, 219. But if he is imprisoned by the master, neither the costs and charges, nor the pay for the hire of another, are to be deducted from his wages. Same case. See also *Thorne v. White*, 1 Pet. Adm. 168, 176, note; *Wilson v. The Mary*, Gilpin, 31; *Wood v. The Nimrod*, id. 83, 89; *The Nimrod*, Ware, 9, 19; *The William Harris*, id. 367; *The David Pratt*, Ware, 495; *Johnson v. Ship Coriolanus*, Crabbe, 239; *The Maria*, Blatchf. & H. Adm. 331; *Thomas v. Gray*, id. 493. But see *Jordan v. Williams*, 1 Curtis, C. C. 69, 86. In *Johnson v. Ship Coriolanus*, *supra*, it was held that the certificate of a consul setting forth the facts that led to the imprisonment was not evidence, and afforded no justification for the master, and that the court would examine the whole question *de novo*, and determine whether the imprisonment was justifiable. See also to the same effect, *Brown v. Brig Independence*, Crabbe, 54; *Wilson v. The Mary*, *supra*; *The William Harris*, Ware, 367, 372. The eleventh section of the Act of 1840, c. 48, 4 U. S. Stats. at Large, 395, is as follows: "It shall be the duty of

<sup>1</sup> In *Allen v. Hallet*, Abbott, Adm. 573, it was held in an action brought against a master by a cook, who had secreted himself on board, to recover damages for being punished for refusal to obey orders, that it was incumbent on the master to prove, in order to justify the punishment, that the man possessed the experience and capacity which would enable him to fulfil the order with safety.

briefly the offences for which the penalty of forfeiture of wages is imposed. A trivial act of irregularity will not work a forfeiture,<sup>1</sup> nor will a single act of intemperance, nor an occasional act, but it must be habitual, to have this effect.<sup>2</sup> Actual violence upon the person of the master, on board his own vessel, by one bound to submit to his authority, is not a trivial of-

consuls and commercial agents to reclaim deserters and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner." In *Jordan v. Williams*, 1 Curtis, C. C. 69, 80, this section was considered to change the law above stated, and it was there held that if the master in a foreign port lays a complaint against any of his crew before the consul, and the latter, upon examination, finds it expedient or necessary to make use of the local authorities, the master is not responsible for their imprisonment as for a tort, the consul being answerable to the injured party for any malversation or abuse of power. See also *Tingle v. Tucker*, Abbott, Adm. 519. But, if the consul is absent, his clerk or assistant has no power to procure the interposition of the local authorities, and if the master imprison a seaman, he is liable as for a tort. *Snow v. Wope*, 2 Curtis, C. C. 301. In *Shorey v. Rennell*, 1 Sprague, 416, *Sprague, J.*, said: "Upon the authority of the case of *Jordan v. Williams*, the captain must be exonerated from liability for the imprisonment on shore by the order and warrant of the consul. But I cannot extend the same immunity to what was done on board of the ship. There the captain was supreme, and must be responsible in damages for wrongs done to his men by his authority or acquiescence. The instructions of the consul might avail him much in a criminal prosecution, in which malice is an essential agreement, and a mistake without evil intent would be a good defence; but in a civil suit the question is whether a wrong has been done to the libellants, and if so they are entitled to indemnity."

<sup>1</sup> *The Gondolier*, 3 Hagg. Adm. 190. In *The Blake*, 1 W. Rob. 73, 74, *Dr. Lushington* said: "Wages may be forfeited, not in cases of discharge for mere misconduct alone, but where the misconduct has been such as to render the discharge of the seaman imperatively necessary for the safety of the ship and the due preservation of discipline." "The disobedience must be either an act of a very gross nature, involving serious danger, or mischief, or malignancy; or it must be habitual, and produce such a general diminution of duty, as goes to the very essence of the contract." Per *Story J.*, *The Ship Mentor*, 4 Mason, 84, 92. See also *Drysdale v. Sch. Ranger*, Bee, Adm. 148; *The Maria*, Blatchf. & H. Adm. 331. In a suit for wages where misconduct is set up as a defence, there must be a special allegation of the facts, with due certainty of time, place, and other circumstances. *Macomber v. Thompson*, 1 Sumner, 384. See *The Olive Chamberlain*, 1 Sprague, 9; *Benton v. Whitney*, *Crabbe*, 418.

<sup>2</sup> *The New Phenix*, 1 Hagg. Adm. 198; *The Lady Campbell*, 2 Hagg. Adm. 5; *The Ealing Grove*, id. 15; *The Malta*, id. 158, 168; *The Duchess of Kent*, 1 W. Rob. 283; *The Atlantic*, *Lush. Adm.* 566. See *Jones v. Sears*, 2 Sprague, 43.

fence.<sup>1</sup> And misconduct on the part of an officer of a vessel is a much more serious offence than if committed by a seaman, and is punished with more severity by the courts.<sup>2</sup> It has been held that neither error of seamanship in a master, nor neglect to communicate to a Lloyd's agent the stranding of the vessel, nor neglect to sign a bottomry bond, works a forfeiture of the master's wages.<sup>3</sup> If, during the voyage, either the master or a seaman smuggle goods, he either forfeits all his wages, or the damage actually sustained by the owners of the vessel may be charged upon his wages.<sup>4</sup> Embezzlement by the master or crew also works a forfeiture.<sup>5</sup> In England it seems that the court have only power to

<sup>1</sup> The Olive Chamberlain, 1 Sprague, 9.

<sup>2</sup> The Olive Chamberlain, 1 Sprague, 9. In the *Florence*, U. S. D. C. New York, *Benedict*, J., 13 Law Times, N. S. 613, the mate of a ship, having a dispute about his wages, left the vessel, and took the ship's chronometer with him. The master was obliged to apply to the police to get it back. Seventy-five dollars was due the mate, and the court allowed twenty-five, holding that he had forfeited the rest by his misconduct. It was also held that the fact that the owners had not sustained any loss did not make his offence less the subject of a forfeiture.

<sup>3</sup> The Camilla, Swabey, Adm. 312.

<sup>4</sup> Willard v. Dorr, 3 Mason, 161; *Freeman v. Walker*, 6 Greenl. 68; *Scott v. Russell*, Abbott, Adm. 258.

<sup>5</sup> This is a well-settled principle of maritime law; *Alexander v. Galloway*, Abbott, Adm. 261. But the question how far a seaman is liable, where an embezzlement is proved to have taken place, but the actors in it are not known, is one of a difficult nature, and the decisions respecting it are conflicting, though we consider the matter as virtually at rest at the present time. In *Crammer v. The Ship Fair American*, 1 Pet. Adm. 242, Judge *Peters* held that in case of an embezzlement, all the crew, including the captain and officers, were bound to contribute for the damage sustained, although one of the crew was on shore, and confined in prison at the time of the embezzlement, the learned judge remarking: "The innocence of an individual is not the question; it turns on the joint obligation of all, to make retribution; it is part of the conditions upon which they engage in their occupation." In *Mariners v. Ship Kensington*, 1 Pet. Adm. 239, where the defence was that certain laborers, who assisted in stowing the vessel, embezzled the goods, the court held that the burden was on the seamen to prove this fact, and there being no direct evidence who committed it, the seamen were held liable. The severity of the rule laid down in these decisions was somewhat modified in *Sullivan v. Ingraham*, Bee, Adm. 182, where proof that some of the crew could not have committed the offence was admitted. And in *Knap v. Brig Eliza & Sarah*, 1 Pet. Adm. 200, where the mate and two seamen were sent ashore in a boat, and one of the men was sent off on the business of the ship, after which the mate and the other seaman left, and the boat was stolen, it was

decree the whole wages forfeited or none.<sup>1</sup> But in this country, a part may be forfeited according to the nature of the offence.<sup>2</sup> Only those wages earned before the act of misconduct, are forfeited.<sup>3</sup> So if the mate is promoted during the voyage, and, while master, commits an offence, it cannot be set up as working a forfeiture of the wages earned as mate.<sup>4</sup> If the seaman repents and offers to return to duty, the master should receive him, and, if he does so, this acts as a condonation of the offence.<sup>5</sup> But permitting

held that only the two latter were liable. And in *Lewis v. Davis*, 3 Johns, 17, *Kent*, C. J., held that where part of the crew were on shore by permission of the mate, the master not being on board, and goods were stolen in their absence, they were not liable. In *Spurr v. Pearson*, 1 Mason, 104, Mr. Justice *Story*, after an elaborate review of the authorities, stated, as his opinion: "That where the embezzlement has arisen from the fault, fraud, connivance, or negligence of any of the crew, they are bound to contribute to it in proportion to their wages; that where the embezzlement is fixed on an individual, he is solely responsible; that where the embezzlement is clearly shown to have been made by the crew, but the particular offenders are unknown, and from the circumstances of the case strong presumptions of guilt apply to the whole crew, all must contribute; but that where no fault, fraud, connivance, or negligence is proved against the crew, and no reasonable presumption is shown against their innocence, the loss must be borne exclusively by the owner or master; that in no case are the innocent part of the crew to contribute for the misdemeanors of the guilty; and further, that in a case of uncertainty, the burden of the proof of innocence does not rest on the crew, but the guilt of the parties is to be established beyond all reasonable doubt before the contribution can be demanded." See also *Joy v. Allen*, 2 Woodb. & M. 303. The rule in England is similar. *Thompson v. Collins*, 4 B. & P. 347; *The Prince Frederick*, 2 Hagg. Adm. 394; *The Duchess of Kent*, 1 W. Rob. 283, 285. In *Anderson v. Sloop Solon*, *Crabbe*, 17, it was held not to be embezzlement for a seaman to sell part of the cargo by direction of the mate in order to procure provisions for the vessel, the master being permanently absent. Nor are the crew liable if a slave, who is entered on board as seaman, escapes without their negligence or fault. *Carey v. Sch. Kitty*, Bee, Adm. 255.

<sup>1</sup> *The Blake*, 1 W. Rob. 73, 87.

<sup>2</sup> *Sprague v. Kain*, Bee, Adm. 184; *Humphreys v. Brig America*, Bee, Adm. 237; *Macomber v. Thompson*, 1 Sumner, 384; *The Maria*, Blatchf. & H. Adm. 331; *The Moslem*, Olcott, Adm. 300; *Orne v. Townsend*, 4 Mason, 541; *Mitchell v. The Ship Orozimbo*, 1 Pet. Adm. 250; *Gladding v. Constant*, 1 Sprague, 73.

<sup>3</sup> *The Ship Mentor*, 4 Mason, 84; *Smith v. Treat*, *Daveis*, 286; *The Olive Chamberlain*, 1 Sprague, 10.

<sup>4</sup> *Airey v. The Brig Ann C. Pratt*, 1 Curtis, C. C. 395, 398.

<sup>5</sup> *Atkyns v. Burrows*, 1 Pet. Adm. 244; *Thorne v. White*, id. 168; *Black v. The Ship Louisiana*, 2 Pet. Adm. 268; *Relf v. The Ship Maria*, 1 Pet. Adm. 186; *Dixon v. The Ship Cyrus*, 2 Pet. Adm. 407; *Johnson v. The Eliza*, U. S. D. C.

an officer to continue in place for a few days, until the master can reach a place more convenient for the exercise of his authority, is not a condonation.<sup>1</sup> And if he punishes him severely the forfeiture is considered as remitted.<sup>2</sup>

The power of the master to degrade an officer<sup>3</sup> or a seaman is limited, and cannot be exercised for trivial offences.<sup>4</sup> And as the

Mass., Abbott on Shipping, Am. ed. 652, n.; The Ship Mentor, 4 Mason, 84; Drysdale v. Schooner Ranger, Bee, Adm. 148.

<sup>1</sup> The Olive Chamberlain, 1 Sprague, 10.

<sup>2</sup> Sprague v. Kain, Bee, Adm. 184; Buck v. Lane, 12 S. & R. 266. In The Ship Moslem, Olcott, Adm. 289, 300, Judge Betts said: "The after-submission of the men to the authority of the ship, and return to duty, with the acquiescence of the master, and their continuing to serve on board until her arrival at Pernambuco, should operate in equity to preserve the wages agreed in the shipping articles. I do not hold the transaction an entire condonation of their offence, yet I do not think the master should be allowed to inflict corporeal punishment sufficient to bring the men back to duty, avail himself of their services, and then exact a confiscation of their whole wages for conduct, although highly disorderly and mutinous, yet based upon colorable grounds of wrong towards them, and of right on their part to hold themselves discharged of all obligation to the ship."

<sup>3</sup> In the case of The Ship Mentor, 4 Mason, 84, 101, Mr. Justice Story said: "I must be permitted to say, that when a man ships in any particular capacity on board a ship, it is not for slight causes that he is to be degraded or compelled to perform other duty. He is not to be subject to the caprice, or distaste, or petulance of the master. He stipulates for fair and reasonable knowledge, and due diligence; but not for extraordinary talents. If he is guilty of fraud or misrepresentation he is doubtless subject to all just consequences. But when he acts *bonâ fide*, and is willing to perform his duty, if he should be more tardy in his movements than other men, it constitutes no just ground for degradation." See also Atkyns v. Burrows, 1 Pet. Adm. 244, 247. Robinett v. The Exeter, 2 Rob. Adm. 261; Thompson v. Busch, 4 Wash. C. C. 338. But if an officer or seaman is incompetent he may be disrated. The Elizabeth Frith, Blatchf. & H. Adm. 195, 210; The Exchange, id. 366; Morris v. Cornell, 1 Sprague, 62. And a steward may be disrated for embezzling the ship stores. Burton v. Salter, U. S. C. C. Mass., 21 Law Rep. 148.

<sup>4</sup> Sherwood v. McIntosh, Ware, 109. It was held, in this case, that a steward could be degraded for acts of dishonesty or habits of intemperance, but not for a single act of intemperance. In Matern v. Gibbs, 1 Sprague, 158, the shipping articles contained a clause giving the master the absolute right to disrate an officer or seaman, and making his judgment final. The case was decided on the point that the clause in question, not having been brought to the notice of the seaman, and having been in use only three years, was not binding. The question whether any length of time or knowledge on the part of the seaman would

power to disrate is remedial only, and not penal, the master cannot degrade a person to the lowest station if there be an intermediate one which he is competent to fill.<sup>1</sup> But if an officer is promoted during the voyage by the captain, it seems that he may send him back to his former situation for a less offence than he could if he had originally been shipped for the higher station.<sup>2</sup> And as the master has no right to degrade an officer where no offence has been committed, so he has no right to order him to do the duties of a seaman as a punishment, if no offence has been committed which would justify it.<sup>3</sup>

## SECTION IX.

### OF THE DESEPTION OF SEAMEN.

Desertion is an offence which it is of great importance to prevent, as otherwise a ship, with all her cargo, might be left unmanageable.<sup>4</sup> It is distinguished from absence without leave, by the intention not to return.<sup>5</sup> But it is desertion to refuse to prevent the court from inquiring into the justness or reasonableness of the clause was not passed on.

<sup>1</sup> *Smith v. Jordan*, U. S. C. C. Mass., 1857, 21 Law Rep. 204. It was held, in this case, that a cooper could not be disrated and ordered to do the duty of a foremast hand, but he should be first tried as cooper's mate.

<sup>2</sup> *Wood v. The Nimrod*, Gilpin, 83.

<sup>3</sup> *Foye v. Leckie*, 1 Sprague, 210. In this case the master found fault with the second mate for the manner in which he had sewed a rope upon an old sail, and ordered him as a punishment to slush the mast, and, on refusal, to furl the light sails. He refused to do these things, and was put in irons. Held, that the master had no right to imprison him.

<sup>4</sup> The master may inflict reasonable punishment for the offence of desertion. Per *Sprague, J.*, in *United States v. Alden*, 1 Sprague, 95, 96.

<sup>5</sup> *Cloutman v. Tunison*, 1 Sumner, 373, 375; *Coffin v. Jenkins*, 3 Story, 108; *Spencer v. Eustis*, 21 Maine, 519; *The Rovena*, Ware, 309; *The Brig Cadmus v. Matthews*, 2 Paine, C. C. 229; *Borden v. Hiern, Blatchf. & H. Adm.* 293; *The Union*, id. 545, 552; *Ship Union v. Jansen*, 2 Paine, C. C. 277; *The Westmorland*, 1 W. Rob. 216; *The Two Sisters*, 2 W. Rob. 125. In *The Westmorland*, it was held that the going on shore without leave, to seek advice as to the effect of the articles, was not a desertion by the maritime law. So it has been uniformly held that it is not desertion for the seamen to leave the vessel, against orders, to go before the consul at a foreign port, to complain of their treatment. *Freeman v. Baker, Blatchf. & H. Adm.* 372; *Hart v. The Brig Otis, Crabbe*, 52.



return when ordered, after an absence without leave,<sup>1</sup> or other temporary separation; as by capture, or wreck.<sup>2</sup> If, during a collision between two vessels, a seaman, under the impression that his own vessel is sinking, jumps on board another, he is not guilty of desertion.<sup>3</sup> Desertion is justified, or rather it is not desertion, when the vessel is left for good cause, as a change of the voyage without consent,<sup>4</sup> cruelty,<sup>5</sup> insufficient pro-

The Act of 1840, c. 48, § 16, 5 U. S. Stats. at Large, 396, provides that "the crew of any vessel shall have the fullest liberty to lay their complaints before the consul or commercial agent in any foreign port, and shall in no respect be restrained, or hindered therein by the master or any officer, unless some sufficient and valid objection exist against their landing; in which case, if any mariner desire to see the consul or commercial agent, it shall be the duty of the master to acquaint him with it forthwith; stating the reason why the mariner is not permitted to land, and that he is desired to come on board; whereupon it shall be the duty of such consul or commercial agent to repair on board, and inquire into the causes of the complaint, and to proceed thereon as this act directs." In *Morris v. Cornell*, 1 Sprague, 62, 65, Judge *Sprague* said of this act: "It may be called the *habeas corpus* of the seaman, and the court will carefully and vigorously guard its inviolability." The right of the seaman under this act to lay his complaints before the consul has been held to extend only to those complaints over which the consul has jurisdiction, as where the seaman is detained contrary to his agreement, or after he has fulfilled it, or where the vessel is unseaworthy, but not to a case of complaint by the seamen that they are badly treated. But even if they have a right to see the consul, they cannot refuse to attend to duty at any moment until they have seen him, unless such refusal is absolutely necessary to prevent the loss of that right. The master is to be allowed some discretion as to the time and mode of landing. *Jordan v. Williams*, 1 Curtis, C. C. 69. But see *Knowlton v. Boss*, 1 Sprague, 163.

<sup>1</sup> *The Bulmer*, 1 Hagg. Adm. 163; *Piehl v. Balchen*, Olcott, Adm. 24.

<sup>2</sup> *Boardman v. The Brig Elizabeth*, 1 Pet. Adm. 128.

<sup>3</sup> *Hanson v. Rowell*, 1 Sprague, 117.

<sup>4</sup> *The Cambridge*, 2 Hagg. Adm. 243; *Moran v. Baudin*, 2 Pet. Adm. 415; *Ingraham v. Albee*, Blatchf. & H. Adm. 289; *United States v. Matthews*, 2 Sumner, 470. See also cases *ante*, p. 36, note 3. But the crew are not justified in such a case in seizing the vessel and bringing it home. *The Mary Ann*, Abbott, Adm. 270.

<sup>5</sup> *The Minerva*, 1 Hagg. Adm. 347, 368; *Limland v. Stephens*, 3 Esp. 269; *Prince Edward v. Trevellick*, 4 Ellis & B. 59, 28 Eng. L. & Eq. 205; *Ward v. Ames*, 9 Johns. 138; *Relf v. The Ship Maria*, 1 Pet. Adm. 186, 193; *Rice v. The Polly & Kitty*, 2 id. 420; *Sherwood v. McIntosh*, Ware, 109; *The America*, Blatchf. & H. Adm. 185. In *Steele v. Thatcher*, Ware, 91, 94, Judge *Ware* said: "I am, as at present advised, far from being prepared to hold that a battery, simply because it is excessive, will be a justification, even though it should pass

visions,<sup>1</sup> or unseaworthiness of the ship.<sup>2</sup> It has been held that if desertion is attempted to be justified on the ground that the deserter was a negro, and that the captain threatened to sell him as a slave, it must be averred that the place where the threat was to be executed was one where slaves could be sold.<sup>3</sup> If the seamen returns after desertion, and is received by the master or by the owner, this is a condonation of the offence and a waiver of the forfeiture;<sup>4</sup> and it has this effect even if there be a clause to the contrary in the shipping articles.<sup>5</sup> He must be received if he offer to return in a proper way, and within a reasonable time, before any other person is engaged to take his place.<sup>6</sup> If he desert before the voyage begins, by not rendering himself on board, he forfeits the advance wages and an equal sum in addi-

very considerably beyond the limits of a moderate discretion. As a general rule, it seems to me that another ingredient should enter into the case. The seaman who proposes, on this ground, to justify a desertion, should not only exhibit proof of the injury, but a just and reasonable ground of apprehension that it would be causelessly repeated, either by showing a general disposition to cruelty on the part of the master, or the existence of some particular pique or malevolence toward him personally." See also *Magee v. The Moss, Gilpin*, 219, 228.

<sup>1</sup> If no provisions at all are provided, then it is clear that a desertion for this cause is justifiable. *The Castalia*, 1 Hagg. Adm. 59; *The Eliza*, id. 182, 186; *Dixon v. The Ship Cyrus*, 2 Pet. Adm. 407. See also *Sigard v. Roberts*, 3 Esp. 71. But to justify a desertion on account of bad provisions, it must be shown that the food is not merely not of the best, but positively bad and unfit for the support of the crew. *Ulary v. The Ship Washington, Crabbe*, 204.

<sup>2</sup> In *Savary v. Clements*, 8 Gray, 155, an action was brought by a seaman for work and labor done, etc. The defence was desertion. On the trial it appeared that the ship was unseaworthy, and the court held that the plaintiff was entitled to recover. See also *Bray v. Ship Atalanta, Bee*, Adm. 48; *Bucker v. Klerkgeter, Abbott*, Adm. 402; and cases *ante*, p. 78, note 1.

<sup>3</sup> *Prince Edward v. Trevellick*, 4 Ellis & B. 59, 28 Eng. L. & Eq. 205.

<sup>4</sup> *Miller v. Brant*, 2 Camp. 590; *Beale v. Thompson*, 4 East, 546; *Train v. Bennett*, 3 Car. & P. 3; *Whitton v. The Brig Commerce*, 1 Pet. Adm. 160; *Cloutman v. Tunison*, 1 Sumner, 373; *Austin v. Dewey*, 1 Hall, 238; *Ship Elizabeth v. Rickers*, 2 Paine, C. C. 291; *Ingraham v. Albee, Blatchf. & H. Adm.* 289.

<sup>5</sup> *Lang v. Holbrook, Crabbe*, 179; *Freeman v. Baker, Blatchf. & H. Adm.* 372.

<sup>6</sup> *The Rovena, Ware*, 309, 320; *Cloutman v. Tunison*, 1 Sumner, 373; *Coffin v. Jenkins*, 3 Story, 108, 119; *The Quintero*, U. S. D. C. Mass., *Lowell, J.*, Jan. 1866. See also cases *post*.

tion;<sup>1</sup> or if he deserts at any time after signing a contract to perform a voyage, he may be apprehended under the warrant of a justice, and compelled forcibly to go on board;<sup>2</sup> but if this be done the forfeiture is waived.<sup>3</sup> It has, however, been held, that receiving a seaman on board after the proper time is no waiver of the penalty.<sup>4</sup> And for such desertion he forfeits all his wages, and all his property on board the ship, unless he is received again on board, and he is liable to pay all damages and costs sustained by the owner in hiring another seaman in his place.<sup>5</sup>

<sup>1</sup> The second section of the Act of 1790, c. 29, 1 U. S. Stats. at Large, 131, provides that if the mariner shall neglect to render himself on board at the time mentioned in the contract, and if the master, or other officer, shall, on that day, make an entry in the log-book of the name of the mariner, and the time that he neglected to render himself (after the time appointed); such mariner shall forfeit for every hour which he shall so neglect to render himself, one day's pay according to the rate agreed upon, to be deducted out of his wages. And if he shall not render himself on board at all, or, after he is on board, shall desert, then he forfeits the advance wages, and an equal sum in addition. See *Cotel v. Hilliard*, 4 Mass. 664.

<sup>2</sup> Act of 1790, c. 29, § 7, 1 U. S. Stats. at Large, 134. It is provided by this section that if the seaman, who has signed a contract to perform the voyage, shall desert, or absent himself without leave, any justice of the peace within the United States may, upon the complaint of the master, issue his warrant to apprehend the deserter and bring him before him, and if it shall then appear that he had signed the contract and that the voyage is not finished, altered, or the contract otherwise dissolved, the justice shall commit him to the house of correction or common jail of the town, there to remain until the vessel is ready to sail, or the master requires his discharge, etc. The Act of 1842, c. 188, § 1, 5 U. S. Stats. at Large, 516, extended somewhat the powers above set forth to United States commissioners. It has been held that justices of the peace alone have the power to try and commit deserting seamen, and that commissioners of the United States can only arrest and commit them for trial. *Ex parte Crandall*, 2 Calif. 144. If the voyage is broken up by a disaster, while a deserter is imprisoned, he must be discharged. *Sims v. Sundry Mariners*, 2 Pet. Adm. 393; *Bray v. Ship Atalanta*, Bee, Adm. 48. Proceedings under this act must be in the name of the United States of America, and the act does not apply to foreign seamen on board of foreign ships. *Ex parte D'Oliviera*, 1 Gallis. 474.

<sup>3</sup> *Bray v. Ship Atalanta*, Bee, Adm. 48; *Brower v. The Maiden*, Gilpin, 294; *Sherwood v. McIntosh*, Ware, 109, 118. See also cases *ante*, p. 91, note 2.

<sup>4</sup> *Malone v. Brig Mary*, 1 Pet. Adm. 139.

<sup>5</sup> The fifth section of the Act of 1790, c. 29, § 5, 1 U. S. Stats. at Large, 133, provided that if the seaman absented himself without permission, and the specified entry was made thereof in the log-book, if he should return to duty within forty-eight hours, he should forfeit three days' pay for every day he was absent, but if he should be absent for a longer time he should forfeit all the wages due, all his

Provision has also been made for the apprehension and delivery of deserters from certain foreign vessels in the ports of the United States. By the Act of 1829,<sup>1</sup> "On application of a consul or vice consul of any foreign government having a treaty with the United States stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government while in any port of the United

property on board or lodged in any store at the time of the desertion, to the use of the owners of the ship, and should pay them all damages they might sustain by being obliged to hire other seamen in his place. This has been materially changed by the twenty-fifth section of the Act of 1856, c. 127, 11 U. S. Stats. at Large, 62, which provides that in case of desertion in a foreign country, the fact and the date thereof shall be noted by the master or commander on the list of the crew, and the same shall be officially authenticated at the first port or place of consulate or commercial agency visited after such desertion, and if there shall be no port visited where there is such an agency, or if the desertion occurred in this country, the fact and time of such desertion shall be officially authenticated before a notary-public immediately at the first port or place where such vessel shall arrive after such desertion. The wages of the seaman, and his interest in the cargo if any, are forfeited to the use of the United States, and are to be paid over to the collector of the port where the crew are to be accounted for. The owners of the vessel may deduct any expenses they have necessarily incurred in consequence of such desertion, and money actually paid, or goods at a fair price supplied, or expenses incurred to or for such seaman. By the general maritime law desertion is a forfeiture of wages. Ord. Wisbuy, art. 61; Hanse Towns, art. 53; 2 Molloy, c. 3, § 10; Cloutman v. Tunison, 1 Sumner, 373; Coffin v. Jenkins, 3 Story, 108; The Rovenia, Ware, 309; Spencer v. Eustis, 21 Maine, 519; The Brig Osceola, Olcott, Adm. 450, 461; The Brig Cadmus v. Matthews, 2 Paine, C. C. 229; The Baltic Merchant, Edw. Adm. 86; The Pearl, 5 Rob. Adm. 224. But the court is not obliged to pronounce an entire forfeiture in all cases, but may take into consideration palliating circumstances not amounting to an excuse. Gifford v. Kolloch, U. S. D. C. Mass., 19 Law Rep. 21; Lovrein v. Thompson, 1 Sprague, 355; Swain v. Howland, 1 Sprague, 424. If a minor is shipped on a whaling voyage by his father, and, after serving several years, deserts after having become of age, the father is entitled to his wages earned during his minority. Coffin v. Shaw, U. S. D. C. Mass., 19 Law Rep. 146, affirmed in Circuit Court, 21 Law Rep. 463. So the minor, if he ships after the death of his father, may avoid the contract by deserting, and recover on a *quantum meruit*. Vent v. Osgood, 19 Pick. 572. And if he ships during the lifetime of his father, and then deserts, his father may recover for his services prior to the desertion. Bishop v. Shepherd, 23 Pick. 492; Lovrein v. Thompson, 1 Sprague, 355. See *ante*, p. 11, n. 1; p. 58, n. 1, and *post*, Book II., c. 12. If there be a series of voyages, wages earned in one will not be forfeited by a desertion in a subsequent voyage. Piehl v. Balchen, Olcott, Adm. 24.

<sup>1</sup> Ch. 41, 4 U. S. Stats. at Large, 359.

States, and on proof by exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of said vessel, it shall be the duty of any court, judge, justice, or other magistrate, having competent power, to issue warrants to cause the said person to be arrested for examination; and if on examination the facts stated are found to be true, the person arrested not being a citizen of the United States, shall be delivered up to the said consul or vice consul, to be sent back to the dominions of any such government, or, at the request, and at the expense, of the said consul or vice consul, shall be detained until the consul or vice consul finds an opportunity to send him back to the dominion of any such government. Provided, nevertheless, that no person shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause. And provided, further, that if any such deserter shall be found to have committed any crime or offence, his surrender may be delayed until the tribunal, before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect."

It has been held that this act does not confer any power upon State officers, but only upon courts and officers of the United States.<sup>1</sup> The true rule, however, seems to be that although the Federal government has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it, yet it may authorize him to perform a particular duty, which, if not forbidden to do by the State government, he may then legally perform.<sup>2</sup>

By statute, desertion seems to be defined as an "absence from the ship for more than forty-eight hours without leave."<sup>3</sup> And

<sup>1</sup> *In re Bruni*, 1 Barb. 187. It was also said that it must be alleged that the desertion was from the vessel while it was "in a port of the United States."

<sup>2</sup> See *Kentucky v. Dennison*, 24 How. 107, 108.

<sup>3</sup> Act of 1790, c. 29, § 5. An important question has arisen in regard to the construction of this act. On the one hand it has been held, that as the statute defines the offence of desertion, and provides the method by which it is to be proved, there can be no forfeiture of wages by the maritime law. This was the view taken by the District Court for the Southern District of New York in numerous cases. See the *Cadmus*, Blatchf. & H. Adm. 139; The *Martha*, id.

there must be an exact entry of the fact on the log-book setting forth the circumstances, made on the day when the absence begins;<sup>1</sup> and it must be a continued absence for forty-eight suc-

151; *The Elizabeth Frith*, id. 195; *The Union*, id. 545, 555. The same view seems to have been taken in the Eastern District of Pennsylvania. See *Wood v. The Nimrod*, Gilpin, 83; *Snell v. The Independence*, id. 140; *Knagg v. Goldsmith*, id. 207. See also *The Schooner Phœbe v. Dignum*, 1 Wash. C. C. 48; *Brig Betsey v. Duncan*, 2 Wash. C. C. 272; *Herron v. Schooner Peggy*, Bee, Adm. 57. On the other hand Mr. Justice Story, in *Cloutman v. Tunison*, 1 Sumner, 373, 380, speaking of this act, said: "But, inasmuch as such prolonged absence might endanger the safety of the ship, or the due progress of the voyage, it deems forty-eight hours' absence without leave, to be *ipso facto* a desertion, and inflicts upon it a total forfeiture of wages. It thus creates a statute desertion, and makes that conclusive evidence of the fact, which would, upon the common principles of the maritime law, be merely presumptive evidence of it. It does not supersede the general doctrine of the maritime law, or repeal it; but merely in a given case applies a particular rule *in pœnam*, leaving the maritime law in all other cases in full efficiency." Although these remarks are to a great extent *obiter*, there being neither maritime nor statutable desertion in that case, yet the doctrine therein contained was fully sustained by the same learned judge in a subsequent case, *Coffin v. Jenkins*, 3 Story, 108, and it may now be considered as the settled construction. See *The Brig Cadmus v. Matthews*, 2 Paine, C. C. 229; *Barton v. Salter*, U. S. C. C. Mass., 21 Law Rep. 148; *Ship Union v. Jansen*, 2 Paine, C. C. 277; *The Rovenà*, Ware, 309. The *Brig Osceola*, Olcott, Adm. 450, 461. If a seaman remains on shore more than forty-eight hours without leave, seeking redress before a public tribunal for an assault committed on board the vessel, it would seem that he could not be treated as a deserter. *Sherwood v. McIntosh*, Ware, 109.

<sup>1</sup> Act of 1790, c. 29, § 5, 1 U. S. Stats. at Large, 100. In *Cloutman v. Tunison*, 1 Sumner, 373, 381, Mr. Justice Story said: "To work the statute forfeiture, it is made an indispensable condition that the mate, or other officer having charge of the log-book, should make an entry therein of the name of such seaman, on the day on which he should so absent himself; and the entry must not merely state his absence, but that he is absent without leave. The entry on the very day is, therefore, a *sine quâ non*." See also *Spencer v. Eustis*, 21 Maine, 519; *The Schooner Phœbe v. Dignum*, 1 Wash. C. C. 48; *Brig Betsey v. Duncan*, 2 id. 272; *The Brig Cadmus v. Matthews*, 2 Paine, C. C. 229; *The Rovenà*, Ware, 309, 312; *Lord v. Kimball*, Sup. Jud. Ct. Mass., 1804, Abbott on Shipping, Am. ed. 648, n; *The Cadmus*, Blatchf. & H. Adm. 139; *The Martha*, id. 151; *The Union*, id. 545; *Wood v. The Nimrod*, Gilpin, 83; *Snell v. The Independence*, id. 140; *Knagg v. Goldsmith*, id. 207; *Magee v. The Moes*, id. 219; *Hunt v. The Brig Otis*, Crabbe, 52; *Bray v. Ship Atalanta*, Bee, Adm. 48; *Herron v. Sch. Peggy*, id. 57. In *Ulary v. The Ship Washington*, Crabbe, 204, the entry in the log-book on the day the men left was "they ran away," and on subsequent days, "absent without leave." Held, that the latter entries were explanatory of the

cessive hours.<sup>1</sup> But where the absence without leave, and without good cause, does not come within the terms of this definition, it is undoubtedly still an offence, punishable as such, and makes the seamen responsible in damages for the consequences.<sup>2</sup> It

first, and sufficient. But see *The Rovena*, Ware, 309, 313. In *The Hercules*, 1 Sprague, 534, the entry was, "May 16th, Aleck and William absconded, and defied us." "May 17th, men still away." This was held not sufficient, because the men might have been away on both days without being absent forty-eight hours. The entry is necessary although the absence is permanent. *Knagg v. Goldsmith*, *supra*. The entry in the log is not conclusive, and parol evidence is admissible to falsify it. *Malone v. The Brig Mary*, 1 Pet. Adm. 139, 140; *Whitton v. The Brig Commerce*, id. 160; *Jones v. The Brig Phoenix*, id. 201; *Thompson v. The Ship Philadelphia*, id. 210; *The Rovena*, Ware, 309, 312; *Orne v. Townsend*, 4 Mason, 541; *The Hercules*, 1 Sprague, 534. The question has arisen, in the case where a seaman goes on shore without leave, and the ship sails before the expiration of the forty-eight hours, whether this amounts to a statute desertion, he being unable to return to the ship. Mr. Justice Story, in *Coffin v. Jenkins*, 3 Story, 108, 113, speaking of this said: "In short, the argument went to this, that it was not a desertion at all, either by the maritime law or under the statute, unless at the time of the seaman's leaving, he left it with the intent absolutely to desert, or *animo non revertendi*. To this doctrine I cannot, in any manner, subscribe. I understand the statute to declare, that an absence from on board the ship without leave, is a forfeiture of his wages, and a desertion, unless he actually rejoins the ship within forty-eight hours; and that it is at his own peril, under such circumstances, to absent himself; and if he is unable to rejoin the ship within the forty-eight hours, the forfeiture is complete and absolute. The ship is not bound to wait for him; but he is bound to rejoin the ship within that period, *suo periculo*." This language would clearly seem to embrace the case of a seaman leaving the ship without leave, but with no intention of deserting. To this extent the remarks are *obiter*, for, in *Coffin v. Jenkins*, the seaman left *animo non revertendi*. In *The Union*, Blatchf. & H. Adm. 545, 559, Judge Betts held, that where the seamen left, intending to return, if the ship sailed before the expiration of forty-eight hours, their wages were not forfeited. But this ruling was reversed on appeal. *Ship Union v. Jansen*, 2 Paine, C. C. 277. If the return is prevented by the act of the captain, they are entitled to their wages. *The Westmorland*, 1 W. Rob. 216. If seamen, who are absent without leave, attempt to return to the ship at night without saying who they are, or what they want, this is not a return which will remit the forfeiture. *Ulary v. The Ship Washington*, Crabbe, 204. See also *Allen v. Hallet*, Abbott, Adm. 573. So, if they return, but refuse to do duty. The return must be unconditional. *The Brig Cadmus v. Matthews*, 2 Paine, C. C. 229. See also *The Ship Philadelphia*, Olcott, Adm. 216.

<sup>1</sup> *The Rovena*, Ware, 309, 313; *The Cadmus*, Blatchf. & H. Adm. 139; *Borden v. Hiern*, id. 293.

<sup>2</sup> In *Cloutman v. Tunison*, 1 Sumner, 373, a desertion was not proved, but the second mate was absent without permission during the unlivery of the ship, and a

seems, however, that if the desertion takes place before the vessel is moored on her arrival at the end of the voyage, it is a statute desertion, working a forfeiture;<sup>1</sup> but if it occurs after she is moored, and before the full unlivery of the cargo or the discharge of the crew, it is not a desertion under the law merchant,<sup>2</sup> but gives to the ship-owner his claim for compensation in damages.<sup>3</sup> A desertion of a part of the crew does not exonerate the remainder from their obligation to perform their duties, although it may make these duties more onerous.<sup>4</sup> And it is no justification for a desertion that the crew were ordered to work on Sunday.<sup>5</sup>

forfeiture of two months' wages was decreed. See also *The Rovena*, Ware, 309, 317; *Snell v. The Brig Independence*, Gilpin, 140; *Knagg v. Goldsmith*, id. 207, 217; *Lang v. Holbrook*, Crabbe, 179; *The Ship Philadelphia*, Olcott, Adm. 216; *Herron v. Schooner Peggy*, Bee, Adm. 57; *The Martha*, Blatchf. & H. Adm. 151; *Jansen v. The Heinrich*, Crabbe, 226. In *Turner's Case*, Ware, 88, it was held that the master might retake the person so leaving and confine him on board, although it was in a home port.

<sup>1</sup> *The Pearl*, 5 Rob. Adm. 224; *The Baltic Merchant*, Edw. Adm. 86.

<sup>2</sup> *Hastings v. The Ship Happy Return*, 1 Pet. Adm. 253; *Cloutman v. Tunison*, 1 Sumner, 373; *Francis v. Bassett*, 1 Sprague, 16; *The Ship Elizabeth v. Rickers*, 2 Paine, C. C. 291; *The Martha*, Blatchf. & H. Adm. 151, 157; *Granon v. Hartshorne*, id. 454; *Knagg v. Goldsmith*, Gilpin, 207; *Jansen v. The Heinrich*, Crabbe, 226; *Herron v. Schooner Peggy*, Bee, Adm. 57. See also *Frontine v. Frost*, 3 B. & P. 302; *McDonald v. Joplin*, 4 M. & W. 284; *The Two Sisters*, 2 W. Rob. 125. See *contra*, *Webb v. Duckingfield*, 13 Johns. 390.

<sup>3</sup> See cases *supra*, p. 104, note 2. This was claimed in *Francis v. Bassett*, 1 Sprague, 16, but refused on the ground that the seaman was suffering from disease to the extent which should excuse him from the performance of a contract for personal service.

<sup>4</sup> See *ante*, p. 43, note 1.

<sup>5</sup> *Ulary v. Ship Washington*, Crabbe, 204.



## CHAPTER XVI.

## OF PILOTS.

## SECTION I.

## WHO PILOTS ARE AND WHAT THEIR DUTIES ARE.

THIS word had formerly, and now has, perhaps, in some of the countries of Europe, two meanings: one was the pilot for the whole voyage, or the sea pilot,<sup>1</sup> the other is the pilot who carried the ship out of or into the harbor to which the pilot belonged, or the coast pilot. But it is in the latter sense that the word is generally used with us. A pilot is for many purposes considered as a mariner or seaman,<sup>2</sup> but has duties and rights which are quite peculiar to him. The office is one of so much importance that it is regulated by law in most civilized countries. In this country, an act of Congress<sup>3</sup> expressly authorizes the several States to make their own pilotage laws; and questions under these laws are cognizable in the State courts.<sup>4</sup> The law of 1789 provides

<sup>1</sup> L'Ord. de la Marine, liv. 2, tit. 4. See also *Keeler v. Fireman's Ins. Co.* 8 Hill, 250; *Steamship Co. v. Joliffe*, 2 Wall. 450.

<sup>2</sup> *Ross v. Walker*, 2 G. Wilson, 264; *The Anne*, 1 Mason, 508; *Hobart v. Drogan*, 10 Pet. 108.

<sup>3</sup> Act of 1789, c. 9, § 4, 1 U. S. Stats. at Large, 54. By the Act of 1837, c. 22, 5 U. S. Stats. at Large, 153, the master of any vessel coming into or going out of any port situate upon waters which are the boundary between two States, may employ a pilot duly licensed by either State.

<sup>4</sup> In *The Wave*, Blatchf. & H. Adm. 235, it was held that the United States courts had concurrent jurisdiction with the State courts to entertain suits for pilotage. On appeal the decision was reversed, on the ground that the act of Congress which adopted the State laws, was passed prior to the passage of the Judiciary Act, and that cases of pilotage was therefore not embraced in the general delegation of admiralty jurisdiction to the district courts. *Schooner Wave v. Hyer*, 2 Paine, C. C. 131. See also *Marshall, C. J.*, in *Gibbons v. Ogden*, 1 Wheat. 1, 207; *Low v. Commissioners of Pilotage*, R. M. Charl. 302, 314. But in *Hobart v. Drogan*, 10 Pet. 108, Mr. Justice *Story* held that the United States courts had a concurrent jurisdiction with the State courts, although

that pilots shall be governed by the existing laws of the States, and also by future laws, "until further legislative provision shall be made by Congress." Since this act was passed, the several States have enacted new laws, or modified the old laws to a great extent. If the power to regulate commerce belongs exclusively to Congress by the Constitution, Congress has no power to delegate that power to the several States, though it may adopt the acts which they have already passed, and they then become of force. But they are then acts of Congress and cannot be changed by the States, unless Congress has the power to adopt prospectively subsequent State laws. But *Marshall*, C. J., in one case,<sup>1</sup> declared that Congress cannot enable a State to legislate. We are, therefore, driven to the alternative, that either all the pilot acts passed by the several States since 1789 are void, or that the States have concurrent jurisdiction over the subject. And this latter view has been adopted by the Supreme Court of the United States.<sup>2</sup> The act of Congress of 1852, c. 106,<sup>3</sup> which we give in the Appendix, has been held by a divided court to apply merely to sea pilots and not to port pilots.<sup>4</sup> The State statutes differ somewhat; and we give in the Appendix the principal provisions enacted by pilot commissioners in pursuance of the power given them by the statutes of New York and Massachusetts, to one or

the pilot's compensation was established by the law of the State in which the action was brought. See also *The Anne*, 1 Mason, 508; *Dexter v. The Bark Richmond*, U. S. D. C. Mass., 4 Law Rep. 20. The State laws are entitled to a liberal construction, as they are especially designed to promote the interests of commerce, and to protect the lives and property of the citizens engaged in it. *Smith v. Swift*, 8 Met. 332.

<sup>1</sup> *Gibbons v. Ogden*, 9 Wheat. 1, 218.

<sup>2</sup> *Cooley v. The Board of Wardens of the Port of Philadelphia*, 12 How. 299. Mr. Justice *Curtis*, in delivering the opinion of the court, said: "It is the opinion of the majority of the court that the mere grant to Congress of the power to regulate commerce, did not deprive the States of the power to regulate pilots, and that although Congress has legislated on this subject, its legislation manifests an intention, with a single exception, not to regulate this subject, but to leave its regulation to the several States. To these precise questions, which are all we are called on to decide, this opinion must be understood to be confined." Mr. Justice *Wayne* delivered a very able dissenting opinion, which is worthy of an attentive perusal. See *Steamship Co. v. Joliffe*, 2 Wallace, 450.

<sup>3</sup> 10 U. S. Stats. at Large, 61.

<sup>4</sup> *Steamship Co. v. Joliffe*, 2 Wallace, 450.

other of which those of the other States generally conform.<sup>1</sup> It will be seen that no persons can act as pilots, but those who are regularly commissioned.

It is true that any person may undertake to guide his own or another's vessel anywhere, but he cannot claim the compensation allowed by law for this service unless he be duly appointed; nor can he claim any compensation for the service if he falsely pretended to have a commission, or as it is technically termed, a branch, and obtains the direction of the ship by this pretence; but he is liable not only civilly in damages, but criminally for any losses or injuries resulting from his falsehood. Every pilot should always have with him the evidence of his authority; for this designates the kind of vessel he may undertake to pilot.<sup>2</sup> Of course it is easy to pilot a vessel in proportion as she draws less water, and difficult as she draws more. Therefore those who have been in the service but a certain time, can pilot only the lightest vessels, up to a certain limit; as they have more experience and skill, they are authorized to take charge of larger vessels; and their authority increases with their experience according to defined and established rules, until they may pilot vessels of any size.

No vessel is bound to take on board a pilot, either going in or coming out of a harbor; but if a pilot offers and is ready, the ship must pay pilotage fees, whether he is taken on board or not.<sup>3</sup> And it has been held that this right is so far in the nature of a contract that it is not lost by the repeal of the law granting it, after the right has accrued.<sup>4</sup> But the pilot cannot proceed in admiralty

<sup>1</sup> For decisions under the State statutes, see *Tilley v. Farrow*, 14 Mass. 17; *Ayres v. Knox*, 7 Mass. 306; *Shepherd v. Mitchell*, 10 Johns. 112; *Heridia v. Ayres*, 12 Pick. 334; *Hunt v. Card*, 14 Pick. 135; and cases *infra*.

<sup>2</sup> *Hammond v. Blake*, 10 B. & C. 424; *Commonwealth v. Ricketson*, 5 Met. 412, 426.

<sup>3</sup> *Nickerson v. Mason*, 13 Wend. 64; *Commonwealth v. Ricketson*, 5 Met. 412; *Smith v. Swift*, 8 id. 329; *Martin v. Hilton*, 9 id. 371; *Hunt v. Mickey*, 12 id. 346; *Hunt v. Carlisle*, 1 Gray, 257; *Gerrish v. Johnson*, 1 Jones, N. C. 335; *Beckwith v. Baldwin*, 12 Ala. 720. But if he offers himself and is refused, he cannot maintain an action for work and labor done. *Donaldson v. Fuller*, 3 S. & R. 505. See also the remarks of *Shaw*, C. J., in *Winslow v. Prince*, 6 Cush. 368, 370. The master is bound to approach the pilot ground carefully, and if in the night, he must hold out a light, and wait a reasonable time for a pilot, and approach one if he can do so with safety. *Bolton v. American Ins. Co.* 3 Kent's Com. 176 n. (a). See *Van Syckel v. The Ewing, Crabbe*, 405.

<sup>4</sup> *Steamship Co. v. Joliffe*, 2 Wallace, 450.

for the penalty provided by statute in case of the refusal of the vessel to employ him, by a suit *in rem*,<sup>1</sup> unless the State law gives a lien.<sup>2</sup> If the pilot refuses to direct the course of the vessel for good reasons, or because the state of the tide or of the wind or weather would endanger the ship if she attempted egress or ingress, but offers to wait until she can move in safety, and then pilot her, we should hold this not as a refusal, but as an offer on the part of the pilot, and therefore as entitling him to claim the fees.

It is not necessary, to constitute "a valid offer of his services," that the pilot should go on board, and tender them to the master. If he hail the vessel when the pilot-boat is so near, and in such a position, that the hail was heard on board the ship, or might have been if the officers and crew had been on duty, this is sufficient.<sup>3</sup>

<sup>1</sup> The Robert J. Mercer, 1 Sprague, 284. In *The George Law*, U. S. D. C. New York, 6 Am. Law Reg. 368, the libel set forth an offer to perform pilotage services to the steamer *George Law*, a refusal by the master to accept the services, an allegation that the libellant became entitled by law to demand and receive from the master and owner the sum of \$39.65, and that the sum though demanded had not been paid. Attachment was prayed against the ship. The owner of the ship intervened and excepted to the libel on these grounds: 1. That the libel and the matters therein set forth are not sufficient in law to constitute a lien upon the ship; 2. That the lien does not state any service rendered to the ship, which constitutes a lien; and 3. That the libel claims a penalty, and that the claim is not within the jurisdiction of the court. It appears from the decision of Judge *Betts*, that the State law did not give a lien on the vessel to enforce the penalty, and he held that a suit *in rem* could not be maintained. The opinion closes with this sentence: "Besides, this libel is *in personam* only. It does not charge a liability of the ship to the claim, and although it prays process and a decree against her therefor, there is no averment of a lien which would entitle the libellant to take a decree in condemnation of the ship. The exceptive allegations to the sufficiency of the libel, and the right of action against the ship upon the averments of the libel, are therefore allowed, and the libel is dismissed with costs." It is difficult, however, to see how the libel could be deemed to be *in personam*.

<sup>2</sup> After the decision in *The Robert J. Mercer*, *supra*, the legislature of Massachusetts, by an act passed in 1862, provided as follows: "The hull and appurtenances of every vessel shall be liable for all legal claims on account of pilotage, either rendered or offered, for the space of sixty days." Ch. 176, schedule, clause 10. In *The Brig America*, U. S. D. C. Mass., 2 Am. Law Review, 458, *Lowell, J.*, held that the lien given by this act could be enforced in admiralty.

<sup>3</sup> *Commonwealth v. Ricketson*, *supra*. But see *Peake v. Carrington*, 2 Brod. & B. 399.

In some of our ports the pilots form a kind of association, and take the duty of going out with a ship or lying out in the offing for one, by turns. In others, each pilot gets what he can; and in such ports the pilots, as might be expected, are, if not more alert, more adventurous, and go further out to sea to board the incoming vessels. It is said to be common for New York pilots to meet ships approaching our coast, at one or two hundred miles distant; and the question has arisen whether they have at once the same authority and rights and responsibility, as when they are near or entering their harbors. We know of no adjudication on this subject; but do not believe that the courts will recognize as a *coast pilot*, one who is so far from the land, that he can discharge no duties but as *sea pilot*, or able seaman. Some of our coasting steamers carry a pilot with them. Thus, for example, some of the steam-packets between Boston and Philadelphia have on board a pilot, who has no duties to perform until the vessel is near the Delaware river.

While a pilot is on board (unless, with the exception arising from extreme distance), he has the absolute and exclusive control in the absence of the master, nor is the master liable for any accident which may then happen.<sup>1</sup> How it is when the master is present may not be so certain. So far, however, as we can gather the law from books or from practice, we should say that the pilot has the control of the ship as soon as he stands on the deck.<sup>2</sup>

<sup>1</sup> Snell v. Rich, 1 Johns. 305.

<sup>2</sup> In Aldrich v. Simmons, 1 Stark. 214, an action of case was brought against the owner of a vessel for the negligence of the pilot, who was employed both by the owner and by the master. The pilot was called as a witness for the defendant, who had released him. It was objected that the master should also have given a release. But Gibbs, C. J., held that he was competent without a release, since the captain could not be responsible to the owner for the misconduct of the pilot. Bowcher v. Noidstrom, 1 Taunt. 568, was a case where an action was brought against the master, not for the negligent act of the pilot, but for a wilful injury on his part, and it was held that the master was not liable. There is also a *dictum* to the effect that a master is not liable, in Yates v. Brown, 8 Pick. 24, per Parker, C. J. But in Denison v. Seymour, 9 Wend. 9, where an action was brought against the master of a steamboat for damage caused by a collision, and it was proved that at the time the master was on board, but not on deck, and that the pilot was chosen by the owners, and at the time was at the wheel, and had the exclusive command of the vessel, the master was held liable. See also United States v. Forbes, Crabbe, 558; United States v. Lynch, 2 N. Y. Legal Observer,

But he has no such absolute control as wholly to supersede the master ; for it remains in the master's power, and it is his duty, to observe the pilot, and in a case of obvious and certain disability, or dangerous ignorance or mistake, to disobey him and dispossess him of his authority. And although a master, if present, is not answerable for any ordinary accident or injury arising from the pilot's default, he would be answerable if it arose from such act or default on the pilot's part, as, within the rule just stated, made it the master's duty to repossess himself of the control and direction of the ship.

The question of the respective rights and duties of the pilot and master has come up in several cases in England, in regard to the liability of owners of vessels for torts or acts of negligence of the pilot ; it being held, under their pilot acts, as we shall presently see, that if the injury is occasioned by the negligence of the pilot alone, the owners are not responsible, but otherwise if there is negligence in the master, either in acts of commission or omission. The master is not bound to interfere to prevent a steamer from being taken to the wrong side of the channel, in disobedience of a statute. The trim of the ship is within the province of the master.<sup>1</sup> In a case where the collision arose from the vessel's going on in a fog, and it was argued that the master was *in pari delicto* from not having interposed and brought the vessel up, Sir John Nicholl expressed a strong opinion in favor of this view, but left the point undetermined.<sup>2</sup> In a later case it was held that it was solely the duty of the pilot to determine when the vessel should be brought up ;<sup>3</sup> and on appeal this decision was affirmed.<sup>4</sup> It is the duty of the pilot to select the time and place

51. In *Huggett v. Montgomery*, 5 B. & P. 446, it was held that trespass would not lie against the owner of a ship who was on board at the time his vessel came into collision with another through the negligence of a pilot on board his vessel, but that case was the proper remedy.

<sup>1</sup> The *Argo*, Swabey, Adm. 462.

<sup>2</sup> The *Girolamo*, 3 Hagg. Adm. 169, 176.

<sup>3</sup> The *Lochlibo*, 3 W. Rob. 310, 1 Eng. L. & Eq. 651.

<sup>4</sup> *Pollok v. McAlpin*, 7 Moore, P. C. 427. The court said : " It was contended at the bar that, in this case, the impropriety of sailing through the Downs was so manifest, that the captain ought to have refused in spite of the pilot's opinion. But we cannot assent to this. It would be very dangerous to hold that there can be any divided authority in the ship with reference to the same subject, and,

of coming to anchor.<sup>1</sup> So when a vessel is taking her berth, the time and manner of dropping the anchor are exclusively within the province of the pilot.<sup>2</sup> And the manner of catting it, preparatory to bringing up for the purpose of taking a berth, is within the province of the pilot.<sup>3</sup> In California, it has been held that it is the duty of the captain or of the harbor-master to select a proper berth, and not the pilot's.<sup>4</sup> But it is there provided by statute that the pilot shall moor the ship safely where the master of the vessel, or the harbor-master, directs.<sup>5</sup>

The pilot is solely responsible for the measures adopted in getting the ship under way.<sup>6</sup> Where a collision was caused by a vessel dragging her anchor, it was held to be the fault of the pilot alone that another anchor was not let go.<sup>7</sup>

It is the duty of the master to see that a good lookout is kept, although there is a pilot on board.<sup>8</sup> If the master and crew have contributed to the accident by not keeping a sufficient lookout, so as to give the pilot the earliest possible information of an approaching vessel, although the pilot is also to blame, the owners of the vessel are not exempt from liability.<sup>9</sup> If two vessels are entangled together, and they can be separated by cutting away part of the rigging, it is the duty of the master to give orders about it.<sup>10</sup> So it has been held to be the duty of the master to have the top-gallant and main royal yards sent down, when this is necessary.<sup>11</sup>

whether the ship was to anchor or to proceed, was a matter which we think belonged exclusively to the pilot to decide." See also *The Maria*, 1 W. Rob. 95.

<sup>1</sup> *The George*, 2 W. Rob. 386, 4 Notes of Cases, 161, 9 Jurist, 670; *The Massachusetts*, 1 W. Rob. 371.

<sup>2</sup> *The Agricola*, 2 W. Rob. 10.

<sup>3</sup> *The Gipsey King*, 2 W. Rob. 537.

<sup>4</sup> *Griswold v. Sharpe*, 2 Calif. 17.

<sup>5</sup> *Compiled Laws of Cal.*, c. 8, § 34.

<sup>6</sup> *The Peerless*, Lush. Adm. 30.

<sup>7</sup> *The Northampton*, 1 Spinks, Adm. 152.

<sup>8</sup> *The Diana*, 1 W. Rob. 131, affirmed, *Stuart v. Isomonger*, 4 Moore, P. C. 11. The court said: "Although the directions of the pilot may be imperative upon them" (the master and crew), "as to the course the vessel is to pursue, [the management of the ship is still under the control of the master." *s. P. Netherlands S. B. Co. v. Styles*, Privy Council, 40 Eng. L. & Eq. 19.

<sup>9</sup> *The Velasquez*, 4 Moore, P. C. 426; *The Iona*, id. 336.

<sup>10</sup> *The Massachusetts*, 1 W. Rob. 371.

<sup>11</sup> *The Christiana*, 7 Notes of Cases, 2, affirmed, *Hammond v. Rogers*, 7 Moore, P. C. 160.

When the pilot is remiss in his duty, it is difficult to determine with precision to what extent the master is bound to interfere. In one case, Dr. *Lushington* said: "It would be a most dangerous doctrine to hold, except under most extraordinary circumstances, that the master could be justified in interfering with the pilot in his proper vocation. If the two authorities could so clash, the danger would be materially augmented, and the interests of the owners, which are now protected both by the general principles of law, and specific enactments, from liability for the acts of the pilot, would be most severely prejudiced."<sup>1</sup> But, "it is the duty of the master to observe the conduct of the pilot, and in the case of palpable incompetency, whether arising from intoxication, or ignorance, or any other cause, to interpose his authority for the preservation of the property of his employers."<sup>2</sup> If the pilot goes below for a few minutes, leaving the second mate in command, with general directions how to steer, and a collision occurs partly through the fault of this officer, the ship is responsible.<sup>3</sup> In one case it was held that if there was a hail from the lookout to alter the helm, and the pilot altered it without exercising his own judgment, the owners of the vessel would be liable. Speaking of interference on the part of the master or crew, Dr. *Lushington* said: "I should never go the length of saying that the mere suggesting to the pilot on the part of the master to take in this sail, or otherwise to keep as near the South Sand light, and *vice versa*, or to bring the ship up, was interfering, in the legal acceptation of the term, with the duties of the pilot; illegal interference is of a different description. If, for example, in this case the boatswain had called out to the men below to starboard

<sup>1</sup> *The Maria*, 1 W. Rob. 95, 110. See also *The Peerless*, Lush. Adm. 32; *The Admiral Boxer*, Swabey, Adm. 196. In *Netherlands Steamboat Co. v. Styles*, 40 Eng. L. & Eq. 19, a case where, in consequence of a defective lookout, a barge was sunk by a swell caused by the steamer, the court said that if the lookout had informed the pilot of the barge, and he had insisted on going on, the owners would have been discharged. See also *Pollok v. McAlpin*, *supra*, p. 111, n. 4; *The Christina*, 3 W. Rob. 27, affirmed, *Petley v. Catto*, 6 Moore, P. C. 371.

<sup>2</sup> *The Duke of Manchester*, 2 W. Rob. 470, 480, affirmed on appeal, *Sherby v. Hibbert*, 6 Moore, P. C. 90. See also *The Christiana*, 7 Notes of Cases, 2; *Hammond v. Rogers*, 7 Moore, P. C. 160; *The Joseph Harvey*, 1 Rob. Adm. 306, 311.

<sup>3</sup> *The Mobile*, Swabey, Adm. 69, 127.



the helm, or if the master called out to port the helm, it would be interference, but it would not be interference to consult the pilot, or to suggest to him that the measures pursued were not proper, or that other measures would in all probability be attended with greater success.”<sup>1</sup>

## SECTION II.

### HOW FAR OWNERS ARE RESPONSIBLE FOR THE TORTS OF PILOTS.

The pilot is the servant of the owner. And if the owner is not obliged to take a pilot, the law only securing to him and appointing a sufficient pilot if he wishes one, it follows that the owner is responsible for injuries resulting from the default of the pilot.<sup>2</sup> In England, it is provided by statute that no owner or master of any ship or vessel shall be answerable for any loss or damage which shall happen to any person or persons, by reason of any neglect, default, incompetency, or incapacity of a licensed pilot in charge of the vessel in pursuance of the provisions of the act.<sup>3</sup>

<sup>1</sup> The *Lochlibo*, 3 W. Rob. 329, 1 Eng. L. & Eq. 651, 656.

<sup>2</sup> The *Attorney-General v. Case*, 3 Price, 302; The *Neptune*, 1 Dods. 467; The *Transit*, cited 1 W. Rob. 50; The *Eden*, 2 W. Rob. 442; *Yates v. Brown*, 8 Pick. 23; *Bussy v. Donaldson*, 4 Dall. 206; *Williamson v. Price*, 16 Mart. La. 399; *Pilot Boat Washington v. The Saluda*, U. S. D. C. So. Car., April, 1831; The *Bark Lotty*, *Olcott*, Adm. 329; *Smith v. The Creole*, 2 Wallace, C. C. 485; The *Carolus*, 2 Curtis, C. C. 69. In this case the vessel was going out of the harbor with a pilot on board who was employed by the owner of the vessel, and the vessel was held liable. Mr. Justice *Curtis* said: “If the pilot in charge of this ship had not been selected and employed by the owner, but had been received by the master in obedience to a requisition of law, enforced by a penalty, then, under the authority of *Carruthers v. Sydebotham*, 4 M. & S. 77; The *Maria*, 1 W. Rob. 95; and The *Agricola*, 2 id. 10, the owners would seem not to be liable for the misconduct or mismanagement of the pilot. But in this instance the pilot has testified that he was employed by the owner of the ship; and no such case is made by the answer as would compel an owner to receive a pilot on board under the statute laws of Massachusetts.”

<sup>3</sup> 6 Geo. IV. c. 125, § 55. In England, it is well settled that if the pilot is alone in fault the owners are not liable. *Bennet v. Moita*, 7 Taunt. 258; *Ritchie v. Bowsfield*, id. 309; *M'Intosh v. Slade*, 6 B. & C. 657; The *Christiana*, 2 Hagg. Adm. 183; The *Protector*, 1 W. Rob. 45; The *Maria*, id. 95; The *Duke of Sussex*, id. 270; The *Vernon*, id. 316; The *Agricola*, 2 W. Rob. 10; The *Fama*, id. 184; The *George*, id. 386, 9 Jurist, 670, 4 Notes of Cases, 161; The *Batavier*, id. 407; The *Atlas*, id. 502; The *Gipsy King*, id. 357; The *Temora*, Lush. Adm. 17.

It was formerly held, under this statute, that if there was a pilot on board, and there was a neglect in the navigation of the vessel, it was *prima facie* attributable to him.<sup>1</sup> But the rule is now well established, that as the owners claim an exemption from a general liability by reason of a special legislative enactment, the burden is on them to show, in order to bring themselves within the provisions of the enactment, that the pilot was alone in fault.<sup>2</sup> The eighty-ninth section of this statute provides that the act shall not extend to ports in relation to which special provisions have been made in any particular act or acts of parliament. It would clearly seem that by this section the general act does not apply to the ports of Liverpool and Newcastle, and it has been so held.<sup>3</sup> The

<sup>1</sup> Bennet v. Moita, 7 Taunt. 258; The Christiana, 2 Hagg. Adm. 183; The Vernon, 1 W. Rob. 316.

<sup>2</sup> The Protector, 1 W. Rob. 45; The Diana, 1 W. Rob. 131, affirmed Stuart v. Isemonger, 4 Moore, P. C. 11; The Ripon, 6 Notes of Cases, 245; The Christiana, 7 Notes of Cases, 2, affirmed Hammond v. Rogers, 7 Moore, P. C. 160; The Carrier Dove, Brow. & L. Adm. 113. See also The Massachusetts, 1 W. Rob. 371; Rodrigues v. Melhuish, 10 Exch. 110, 28 Eng. L. & Eq. 474; The Mobile, Swabey, Adm. 69, 127; Netherlands S. B. Co. v. Styles, Privy Council, 40 Eng. L. & Eq. 19. In The Batavier, 2 W. Rob. 467, the pilot had been in the constant employ of the owners for fifteen years, but as he was alone in fault the owners were held not liable. In The Christiana, *supra*, the pilot had done his duty by bringing the vessel to the Downs, where she anchored, but as he could not leave on account of bad weather the owners were held entitled to the legal protection which his presence gave them. See also Lacy v. Ingram, 6 M. & W. 302. The 87th section of the 6 Geo. IV. c. 125, provided that nothing in the act contained should extend to, affect, or impair the jurisdiction of the High Court of Admiralty. Sir John Nicholl construed this to mean that the act only applied to the common-law courts, and that the vessel was still liable *in rem* although there was a pilot on board. The Girolamo, 3 Hagg. Adm. 169. See also The Baron Holberg, 3 Hagg. Adm. 244; The Gladiator, *id.* 340; The Eolides, *id.* 367; Smith v. The Creole, 2 Wallace, C. C. 485, 518. But it is now well settled in England that the clause above cited means that the Court of Admiralty shall retain its jurisdiction to administer the law as altered by the act, and, therefore, the vessel is not liable if the pilot is alone in fault. The Protector, 1 W. Rob. 45, 52, and cases *supra*.

<sup>3</sup> Attorney-General v. Case, 3 Price, 302. The King's Bench, in Carruthers v. Sydebotham, 4 M. & S. 77, were of a different opinion. The Supreme Court of the United States, in a case of collision happening in the port of Liverpool between two American vessels, seemed to consider it settled by the English admiralty cases that the owners were not liable if there was a pilot on board. Smith v. Condry, 17 Pet. 20, 1 How. 28. It is to be observed, however, that the cases

Liverpool and Newcastle acts contain no clause similar to that in the general statute of 6 Geo. IV., but provide, merely, that a master shall take a pilot on board or shall pay pilotage. This is similar to our own statutes, and the question arises whether the pilot can be said to be taken on board by such compulsion that the owner is not liable for his acts. In England, the weight of authority is clearly in favor of exonerating the owner.<sup>1</sup>

cited are *The Maria*, 1 W. Rob. 95; *The Protector*, id. 45; *The Diana*, id. 131. The last two cases were decided under the general act, and are, therefore, not authorities to the point that the 55th section applies to the Liverpool act. In *The Maria*, *supra*, which was a case under the Newcastle act, which is similar to the Liverpool, Dr. *Lushington* said he doubted very much whether he could apply the 55th section of the general act to the case of a Newcastle pilot. He expresses the same doubt also in the subsequent case of *The Agricola*, 2 W. Rob. 10.

<sup>1</sup> The Court of King's Bench, in *Carruthers v. Sydebotham*, 4 M. & S. 77, and the Court of Exchequer, in *Attorney-General v. Case*, 3 Price, 302, have arrived at opposite conclusions in regard to the construction of the Liverpool act. In the former case it was held that the taking a pilot on board was compulsory, and the owners, therefore, were not liable. In the latter case a different opinion was expressed, but the facts of the case did not call for it. The vessel was lying at anchor in the river Mersey. By the 31st and 34th sections of the Liverpool act, it is provided, that any vessel, whilst lying at anchor, may require a pilot to remain on board, upon payment of five shillings a day for his services. The pilot was retained on board, and the owners were held liable. This case therefore, is not an authority against the construction of the act, as laid down in *Carruthers v. Sydebotham*. See also *Rodrigues v. Melhuish*, 10 Exch. 110, 28 Eng. L. & Eq. 474; *The Maria*, Law Rep. 1 Adm. 258. It was held, in *The Montreal*, 24 Eng. L. & Eq. 580, where a pilot had been taken on board under the Liverpool act to pilot the vessel to the Queen's Docks at Liverpool, and had subsequently anchored in the river Mersey, and came into collision the next day while proceeding up the river, that the vessel was not liable, the pilot being alone to blame. And in *The Maria*, 1 W. Rob. 95, and *The Agricola*, 2 W. Rob. 10, cases under the Newcastle act, it was held, that if the master was obliged to take a pilot on board or to pay full pilotage, such a taking was by compulsion and the owners were not liable. In both these cases the vessels were homeward bound. In *The Annapolis*, Lush. Adm. 312, Dr. *Lushington* said: "But whether the Merchants' Shipping Act applies to this case or not, I am of opinion that the owners of the *Annapolis* are exempt from responsibility by reason that the employment of the pilot was compulsory: the pilot was not their servant or agent; they could not avoid intrusting him with the management of the vessel. In the case of *The Maria*, I have stated at some length my reasons for coming to this conclusion. I believe that the doctrine I then maintained, and now adhere to, is consonant with justice, supported by authority, and is in strict accordance with the principle adopted by the Legislature in the Merchants' Shipping Act." In this case a vessel bound for Liverpool took

But in this country the question does not seem to be fully determined.<sup>1</sup>

The Merchants' Shipping Act<sup>2</sup> provides that, "No owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law." It has been held that this act should be construed strictly as it deprives parties injured of a remedy they would otherwise have

a pilot off Point Lynas, was brought to anchor in the Mersey, and lay there two or three days waiting, for want of water to dock. She was then conducted by the same pilot into dock, and on the way came into collision with another vessel through the pilot's fault. By law a vessel is obliged to take a pilot or to pay full fees. The pilot is required to cause the vessel to be properly moored in the Mersey, and to pilot her into a wet dock without any additional charge, unless his attendance is required while the vessel is at anchor, in which case he is entitled to five shillings a day. Held, that the taking of a pilot was compulsory, and that the compulsion continued until the vessel was in the dock.

<sup>1</sup> It would seem to have been the opinion of Mr. Justice *Curtis*, in the case of *The Carolus*, 2 *Curtis*, C. C. 69, cited *ante*, p. 114, note 2, that had the vessel been homeward bound, so that the master would have been obliged to have taken the first pilot that offered, or have paid full pilotage, the owners of the vessel would not have been liable for the collision. Let us see, then, whether this opinion is repugnant to the American authorities. In *Yates v. Brown*, 8 *Pick.* 23, and in *The Julia M. Hallock*, 1 *Sprague*, 539, the vessels were outward bound. In *Bussy v. Donaldson*, 4 *Dall.* 206, and in *Williamson v. Price*, 16 *Mart.* 399, it does not appear which way the vessels were going. In the case of *The Bark Lotty*, *Olcott*, *Adm.* 329, it was contended that the exemption from liability continued after the vessel was moored to the wharf by the pilot. But the court very properly decided otherwise. *Smith v. The Creole*, 2 *Wallace*, C. C. 485, was also a case of an outward-bound vessel. This case was argued at great length, and a very learned opinion pronounced by Mr. Justice *Grier*, to the effect that the Pennsylvania act, which provides that every vessel shall be *obliged* to receive a pilot, or in default thereof, shall pay a sum equal to half pilotage, is not compulsory. Such, also, is the opinion of Mr. Justice *Story*; *Story on Agency*, § 456, a, note 1. In *Griswold v. Sharpe*, 2 *Calif.* 17, it was said that when a vessel is properly in charge of a licensed pilot, the owner is not responsible for damages which may ensue for his negligence or misconduct. But in that case, the master being in fault, the owners were held liable. It will be seen that there is no *decision* in opposition to the suggestion thrown out by Mr. Justice *Curtis*, though it cannot be denied that the principles and reasonings, upon which the authorities are based, are against it.

<sup>2</sup> 17 & 18 *Vict. c.* 104, § 388.

had.<sup>1</sup> To exonerate the owners, the loss must be occasioned solely by the fault of the pilot;<sup>2</sup> and the burden is on the owners of the vessel to prove this.<sup>3</sup>

The legislature of a country has no authority over foreign vessels on the high seas out of its jurisdiction, but may impose any conditions on a foreign vessel entering its ports, and may oblige foreign ships inward bound to take a pilot at a convenient station beyond three miles from the shore.<sup>4</sup>

If a ship neglects to take a pilot that offers, the owners will be answerable in damages to shippers or others, for any loss which may happen by reason of their neglect or refusal.<sup>5</sup> And pilots

<sup>1</sup> The *General de Caen*, Swabey, Adm. 9. In this case a French vessel coming up the Thames took on board a pilot, and, as none of her crew understood English, a waterman to take the wheel. The vessel came into collision with a barge, owing to the waterman disobeying an order of the pilot. Held, on the facts, that the waterman was not a servant of the pilot, and that the vessel was liable.

<sup>2</sup> The *Mobile*, Swabey, Adm. 127; The *Admiral Boxer*, id. 193; The *Borussia*, id. 94.

<sup>3</sup> In *The Schwalbe*, Lush. Adm. 239, the defendants' vessel was charged with improperly starboarding her helm. The defendants claimed that the helm was not starboarded, but was put to port. The master admitted that the pilot gave the order to starboard, but testified that the pilot immediately corrected it, and gave the order to port, which was obeyed. Lord *Chelmsford*, in the Privy Council, said: "The owners, to relieve themselves from liability, are bound to prove that an order to starboard the helm at this time was given by the pilot. But no such proof is anywhere to be found, except in the hasty expression (corrected, as the witness says, almost before the words were out of his mouth, and not acted upon), just at the moment of the collision. The owners, therefore, fail entirely in the evidence necessary to transfer the responsibility from themselves; and without considering whether there was any negligent act or omission on the part of the crew of the *Schwalbe*, their lordships think it sufficient to say, that the owners have not succeeded in establishing that the collision is to be attributed solely (if at all) to the fault of the pilot." In *The Carrier Dove*, Brow. & L. Adm. 113, it was held that it was not enough to show that the pilot was on deck giving general orders, but the owners must show that the particular order which caused the damage was given by the pilot.

<sup>4</sup> The *Annapolis*, Lush. Adm. 295.

<sup>5</sup> See *McMillan v. Union Ins. Co.* 1 Rice, 248; *Keeler v. Fireman's Ins. Co.* 3 Hill, 259. And in an English case, where a vessel, seized on justifiable grounds, as appeared by the condemnation of a part of her cargo, was lost by the neglect of the captors to take a pilot on board, the Court of Admiralty decreed restitution in value against them. *The William*, 6 Rob. Adm. 316. But if no pilot can be

themselves are answerable like other persons for any harm which they may do, by negligence or default.<sup>1</sup>

If a pilot refuses to board a vessel, he is liable for damages civilly and criminally.<sup>2</sup> By some of the ancient marine ordinances the pilot was obliged to make full satisfaction, or to lose his head, in case of any injury happening through his fault.<sup>3</sup>

obtained, and the most judicious course is for the master to attempt to go into port without one, the owners will not be responsible for a loss happening in consequence of his so doing. *Van Syckel v. The Sch. Thomas Ewing*, Crabbe, 405.

<sup>1</sup> *Yates v. Brown*, 8 Pick. 24; *Heridia v. Ayres*, 12 id. 384; *Campbell v. Williamson*, 2 Whart. Dig. 680. See also *Slade v. The State*, 2 Carter, 33. In *Lawson v. Dumlin*, 9 C. B. 54, an action was brought against a pilot for negligently running into the ship of the plaintiff. The pilot, at the time, was in command of another vessel. He was held liable. In *Stort v. Clements*, Peake, 107, the general rule was admitted, but as the collision took place in consequence of the pilot steering the vessel according to the direction of the officer in charge, he was not held responsible. If a steamboat is hired for the purpose of towing a vessel, to which she is fastened, and both are under the direction of a licensed pilot, if the steamboat is injured in the course of the navigation, the owner of her is not entitled to damages, unless it was caused by the undue negligence of the pilot. *Reeves v. The Ship Constitution*, Gilpin, 579.

<sup>2</sup> *Commissioners of Pilotage v. Low*, R. M. Charl. 298.

<sup>3</sup> *Laws of Oleron*, art. xxiii.; *Consolato del Mare*, c. 250.

## CHAPTER XVII.

## OF THE LIMITATION OF THE LIABILITY OF SHIP-OWNERS BY STATUTE.

IN 1851<sup>1</sup> an act of Congress was passed entitled "An act to limit the liability of shipowners, and for other purposes." The provisions of this act are of paramount importance to the mercantile community, though the main object of the act has been frustrated by the neglect on the part of its framers to embody this intent in intelligible language.

We have already considered the liability of the owners of a vessel, and of the master, by the common law, and shall now treat of the limitation of this liability by the maritime law and by the various statutes that have been passed in England and in this country.

By the general maritime law the responsibility of the owners of a vessel for the acts of the master and mariners, was limited to the value of the ship and freight; and, by abandoning them, or by their loss before the termination of the voyage, all liability ceased.<sup>2</sup> The Marine Ordinance of France of 1681,<sup>3</sup> provided that the owners of ships should be responsible for the acts of the master, but that they should be discharged upon abandonment of their ship and freight. There has been quite a discussion whether this provision applied to contracts made by the master within the legitimate scope of his authority as master, as where he borrowed money for the necessary repairs and supplies of the ship.<sup>4</sup>

<sup>1</sup> Acts of 1851, c. 43, 9 U. S. Stats. at Large, 635.

<sup>2</sup> Emerigon, *Contrats à la Grosse*, c. 4, § 11; *The Rebecca*, Ware, 188, 198; *The Phebe*, Ware, 263, 271. By the civil law each of the owners was bound in *solido* for the full amount of the obligations of the master, arising *ex contractu*. Dig. 14, 1, 1, 25; Dig. 14, 1, 2. But for obligations *ex delicto*, each was bound only for his part, that is, in proportion to the interest he had in the ship. Dig. 4, 9, 7, 5; *The Rebecca*, Ware, 188, 194; *The Phebe*, Ware, 263, 268. The contrary is stated in *Stinson v. Wyman, Daveis*, 172, 175, but apparently without reflection.

<sup>3</sup> Ord. de la Mar. liv. 2, tit. 8, art. 2.

<sup>4</sup> Valin, book 2, tit. 8, art. 2, and Pothier, "*Des Propriétaires*," liv. 2, tit. 8,

In England, the liability of the owners of vessels has been limited by various statutes to the value of the ship and freight.<sup>1</sup> Several questions of great interest have been decided under these statutes, which may be referred to as aids in the true construction of the act of 1851.

In 1818,<sup>2</sup> the legislature of Massachusetts passed an act on this subject mainly based on the English statute of 7 Geo. II. This was followed by an act in Maine in 1821,<sup>3</sup> which is nearly an exact copy of the Massachusetts statute. In 1836,<sup>4</sup> the Massachusetts statutes were revised, and the statute of 1818 was entirely rewritten. In 1840, the Maine statutes were revised, and the provisions of the Revised Statutes of Massachusetts substantially adopted.<sup>5</sup>

The Act of Congress of 1851 is principally taken from the English Act of 26 Geo. III., and from the forty-seventh chapter of the Revised Statutes of Maine of 1840.

Section 1 relates to a loss by fire, and is taken nearly word for word from the second section of 26 Geo. III. c. 86. It provides generally that a shipowner shall not be liable for loss by fire, "unless such fire is caused by the design or neglect of such owner." Then follows this proviso, which is not in any previous act, "Provided that nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners."

art. 2, hold, on the one hand, that the provisions of the article above referred to, do not apply to the contracts of the master, while Emerigon, *Traite à la Grosse*, c. 4, § 11, is of the opposite opinion. The New Code de Commerce of 1807 adopts substantially the language of the Ordonnance, and this has occasioned another controversy. Pardessus, *Cours de Droit Comm.* tom. 3, tit. 3, c. 3, art. 663, supports the views of Valin, while Boulay Paty, *Droit Comm.* tom. 1, tit. 3, adopts those of Emerigon. The Court of Cassation has, however, decided that the owner of a vessel is indefinitely responsible for all the acts of the captain within the sphere of his authority, and especially for bottomry loans contracted in the course of the voyage. *Tourrel v. Fabry*, 19 Am. Jurist, 233.

<sup>1</sup> *Stats.* 7 Geo. II. c. 15; 26 Geo. III. c. 86; 53 Geo. III. c. 159; 17 & 18 Vict. c. 104, § 503, *et seq.*; 25 & 26 Vict. c. 63, § 54, *et seq.*

<sup>2</sup> *Acts of 1818*, c. 122.

<sup>3</sup> *Maine Stats.* 1821, c. 14, §§ 8-10.

<sup>4</sup> *Rev. Stats. Mass.*, c. 32, §§ 1-4. This chapter was re-enacted with slight verbal changes in 1860. *Gen. Stats. Mass.*, c. 52, §§ 18-21.

<sup>5</sup> *Rev. Stats. Maine*, 1840, c. 47, §§ 8-11. See also *Rev. Stats.* 1857, c. 85, §§ 5, 6.



The corresponding section of the statute 26 Geo. III. has been held to apply merely to goods on board a vessel. Ship-owners, therefore, were held liable for a loss by fire while the goods were being conveyed in lighters to the ship for the purposes of transportation.<sup>1</sup> And the same rule has been applied under the act of 1851, where cargo was destroyed by fire after it was taken from the vessel, and before it was delivered to the consignees.<sup>2</sup>

The words "design or neglect of such owner," have been held not to include a loss occasioned by the negligence of the master or mariners; and the owner is, therefore, not liable for a loss by fire so occasioned.<sup>3</sup>

The proviso which ends this section presents an interesting question. It clearly gives the right to the parties to a contract of affreightment to make such contract as they please, extending or limiting the liability of ship-owners. It is well-settled law that fire is not a peril of the seas within the meaning of this exception in a bill of lading. If, then, an ordinary bill of lading is given containing only the exception "peril of the seas," is this a "contract" within this proviso, which extends the liability of the ship-owner to a loss by fire? In a recent case before the Supreme Court of the United States, it seems to have been assumed that a ship-owner would not be liable in such case.<sup>4</sup>

<sup>1</sup> *Morewood v. Pollok*, 1 Ellis & B. 743, 18 Eng. L. & Eq. 341. In New York, it has been held that the ship is not liable in such a case under our statute of 1851. *Dill v. The Bertram*, U. S. D. C., N. Y., *Bells, J.*, The goods had been delivered to the vessel, and were on the wharf at the time.

<sup>2</sup> By *Curtis, J.*, in *Goddard v. Bark Tangier*, U. S. C. C. Mass., 21 Law Rep. 12; *Salmon Falls Co. v. Bark Tangier*, id. 6; *The Ship Middlesex*, id. 14. One of these cases was taken to the United States Supreme Court, but no opinion was expressed upon this point. *Richardson v. Goddard*, 23 How. 28. And this point seems to have been assumed in *Gatliffe v. Bourne*, 4 Bing. N. C. 314, 3 Man. & G. 643, 7 Man. & G. 850.

<sup>3</sup> *Walker v. Transportation Co.* 3 Wallace, 150.

<sup>4</sup> *Walker v. Transportation Co.* 3 Wallace, 150. In this case no bill of lading was given; but the defendants pleaded, first, that the property was received on board with reference to the terms of the bills of lading usually given by them, which contained an exception of the dangers of navigation, fire, and collision; and second, that the property was received on board with the understanding that the usual bill of lading common in that trade should be given, and that such bill of lading exempted the ship-owner from loss by "perils of navigation, perils of the seas, and other equivalent words;" and that by usage and custom these words

Section 2 provides that if the "shipper or shippers of platina, gold, gold dust," &c., shall lade the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the "bill of lading therefor," the master and owners shall not be liable in any form or manner. "Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered."

This section is based on the third section of 26 Geo. III., c. 86. By the English act the shipper must at the time of shipping "insert in his bill of lading, or otherwise declare in writing . . . the true nature, quality, and value" of the goods. A literal construction of the act of 1851 would deprive the shipper of remedy, if he did not, at the time of lading, give a note in writing, stating the true character and value, although the bill of lading might contain these particulars. In one case, however, a more liberal construction was given, and it was held that if the shipper acted honestly, and the necessary statement was contained in the bill of lading this was sufficient.<sup>1</sup>

Under 26 Geo. III., c. 86, it has been held that a description in the bill of lading of the property shipped as "1,338 hard dollars" is a sufficient statement of the value, the dollar being a coin current at the port of shipment at the time, and that it is not neces-

included loss by fire, unless the fire had been caused by the negligence or misconduct of the owner or his servants. The libellants then amended their libel and admitted the contract, and claimed that the loss was occasioned by the negligence of the owner's servants or agents. The court rested its decision on the construction to be given to the second ground of defence, and held that there was nothing in a bill of lading concerning "perils of navigation and perils of the seas" which would make the owner liable for the negligence of his servants; and that the usage set up by the respondents, and admitted by the libellants, was not founded on a custom which the law could support, and that the case must be governed by the act of 1851. The libel was accordingly dismissed.

<sup>1</sup> *Watson v. Marks*, U. S. D. C. Penn., *Kane*, J., 2 Am. Law Reg. 161. The case of *Greyor v. The Black Warrior*, U. S. D. C. La., Boston Courier, March 18, 1858, seems to be opposed to so liberal a construction, but the report of the case does not state whether or not the bill of lading contained a statement of the facts required by the statute to be in the note.

sary to state the value at the port of delivery.<sup>1</sup> Under the act of 17 & 18 Victoria, which requires "the true nature and value" of the article to be stated, the following description is not sufficient, "one box containing about two hundred and forty-eight ounces of gold dust," for gold dust varies in value.<sup>2</sup>

Sections 3 and 4 are so closely connected that we will consider them together.

Section 3 is as follows: "That the liability of the owner or owners of any ship or vessel, for any embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending."

Section 4, provides "that if any such embezzlement, loss, or destruction, shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally

<sup>1</sup> *Gibbs v. Potter*, 10 M. & W. 70.

<sup>2</sup> *Williams v. African Steamship Co.* 1 H. & N. 300, 37 Eng. L. & Eq. 462.

entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease."

Section 3 is nearly the same as section eight of the Maine Revised Statutes of 1840, c. 7. The word "loss," which is not in the Maine statutes was added in the Senate.<sup>1</sup> The clause "or for any loss, damage, or injury by collision," is not in the statutes of Maine or Massachusetts, or in these words in any of the English statutes.

Section 4 is nearly word for word the same as section nine of the Maine statute, as far as the last clause. The Maine statute provides for the bringing of a bill in equity for the discovery of the loss or damage, the value of the ship and freight, and for the equal distribution of the sum for which the owners may be liable. The last clause of the fourth section is entirely different from that contained in any previous statute, and has given rise to questions of great difficulty and embarrassment.

Under the English statutes it has been held that the value of the vessel is the sum for which she could have been sold, and this is to be ascertained, not by making deductions from her cost price proportioned to her age, but by a valuation and appraisement.<sup>2</sup> In respect to the freight, that paid in advance has been included.<sup>3</sup> And it has been held that the whole freight is liable, and that no deductions are to be made for, or on account of, bottomry, mortgage, pilotage, or towage, or for seamen's wages.<sup>4</sup> The amount of freight for which the owners are liable, is that which would have been earned had the voyage been completed, and not that

<sup>1</sup> Congressional Globe (1850, 1851), vol. 23, p. 715.

<sup>2</sup> *Wilson v. Dickson*, 2 B. & Ald. 2; *Dobree v. Schroder*, 6 Sim. 291, 2 Mylne & C. 489. In *The African Steamship Co. v. Swanzy*, 2 Kay & J. 660, it was held that the value of a ship, within the meaning of the Merchant Shipping Act of 1854, 17 & 18 Vict. c. 104, § 504, was not the value which the owner would have set upon his vessel, nor was the sum for which he might have recently insured her the only criterion, although it might be one of many. But under ordinary circumstances, and with the exception of the case where there is no market for a ship of the kind, such value would be taken to be what the ship would have brought, if sold immediately before the loss. In the excepted case, one criterion would be to ascertain what the ship cost, and then to deduct the subsequent deterioration. See also, generally, *The Dundee*, 1 Hagg. Adm. 109, s. c. *Gale v. Laurie*, 5 B. & C. 156; *The Carl Johan*, cited 1 Hagg. Adm. 113.

<sup>3</sup> *Wilson v. Dickson*, 2 B. & Ald. 2.

<sup>4</sup> *The Benares*, 1 Eng. L. & Eq. 637.

calculated on at the commencement of the voyage.<sup>1</sup> If the suit is *in rem* for damage done by a collision, although the proceeds of the vessel are insufficient to make good the loss, the court cannot engraft upon the proceeding *in rem* a personal action against the master who is a part-owner, to make good the excess of damage beyond the proceeds of the ship.<sup>2</sup> And the negligent part-owner cannot be made answerable beyond the value of the ship and freight, if the action is *in rem*, and he is a party to the suit merely by reason of his entering his appearance as owner.<sup>3</sup> The owners of a vessel are, however, personally liable for costs, if the ship and freight are not sufficient to compensate for the damage done.<sup>4</sup>

<sup>1</sup> *Canaan v. Meaburn*, 1 Bing. 465. In this case the vessel sailed with a full cargo, the freight of which would have amounted to £2,000 if the goods had arrived at their port of destination. On the voyage the vessel put into port in distress, and the captain sold a part of the cargo which belonged to the owners of the vessel for the purpose of raising funds for repairs. Part was applied to this object, and the remainder of the proceeds was remitted to the owners of the vessel. The vessel then proceeded on her voyage, but became leaky, and a jettison of another portion of the cargo was made. She then put into an intermediate port, and the cargo was unloaded and stored in two warehouses. Soon after one warehouse with its contents was consumed by fire, leaving one hundred and forty chests of indigo, and thirty casks of tallow, which were in another warehouse, remaining. The ship and the remaining cargo were afterwards sold without the knowledge or privity of the defendants. The jury found that the ship might have been repaired and the goods forwarded. The court held that only the freight of the goods which remained, and which might have been sent on, was liable. See *The Leo*, Lush. Adm. 444.

<sup>2</sup> *The Hope*, 1 W. Rob. 154.

<sup>3</sup> *The Volant*, 1 W. Rob. 385.

<sup>4</sup> *The Volant*, 1 W. Rob. 390; *The John Dunn*, 1 W. Rob. 159. A prohibition was afterwards moved for in this case in the Court of Queen's Bench, but the rule was discharged, the court being of the opinion that the true principle had been adopted in the admiralty court. s. c. 1 W. Rob. 162, *nom.*, *Ex parte Rayne*, 1 Q. B. 982, 1 Gale & D. 374. In *Dobree v. Schroder*, 6 Sim. 291, it was held that where a judgment has been obtained against a ship-owner at law, and he thereupon files a bill in equity under the statute, he is liable for the costs incurred by the plaintiff in the suit at law. Section 514 of the Merchants' Shipping Act of 17 & 18 Vict. provides "as to payment of costs, as the court thinks just." In *African Steamship Co. v. Swanzy*, 2 Kay & J. 660, several suits had been brought at law; a bill was then filed in the Court of Chancery by the ship-owners, and the claims against the vessel proved. Held, that the owners of the vessel were liable for the costs of the suits at law and in the Court of Chancery. The court intimated that if there had been adverse litigants or other special circumstances over which the complainants in equity had no control, the result

Under 7 Geo. II. c. 15, the owner of a ship is not liable beyond the value of the ship and freight for a robbery by persons from without, one of the mariners having given intelligence which led to the robbery, and having shared in the spoil.<sup>1</sup> A sale by the master of goods at a foreign port to pay for repairs to the vessel is not a "loss or a damage," within the 53 Geo. III.<sup>2</sup> The owners of a damaged vessel and part of the cargo, who had obtained a decree of the court in a collision case, are entitled to have the proceeds of the vessel which did the damage, paid out to satisfy the amount of their loss, in preference to the owners of the remaining portion of the cargo, who had not brought their action until the decree in the first suit had been pronounced. And the court has no power under 53 Geo. III., on petition of the other owners of the cargo, to apportion the proceeds.<sup>3</sup>

In England, by the Act of 17 & 18 Vict.,<sup>4</sup> the owner may institute proceedings in the High Court of Chancery in England or Ireland, and in Scotland in the Court of Sessions, and in any British possession in any competent court, to determine the amount of his liability, and to distribute such amount ratably among the several claimants, with power to the court to stop all actions and suits pending in any other court in relation to the same subject-matter. But as a general rule the court in which the case is pending will not restrain the plaintiff from proceeding because the defendant has filed his bill in equity for relief.<sup>5</sup> And in order to stay proceedings the owner must admit and aver that he had incurred liability in respect of some damage.<sup>6</sup> If a party obtains judgment in another court before the owner institutes proceedings

would be different, and that the decision ought to depend on the question, who was eased by the proceedings.

<sup>1</sup> *Sutton v. Mitchell*, 1 T. R. 18.

<sup>2</sup> *Atkinson v. Stephens*, 7 Exch. 567.

<sup>3</sup> *The Saracen*, 2 W. Rob. 451, affirmed 6 Moore, P. C. 56; *The Clara*, Swabey, 1.

<sup>4</sup> Ch. 104, § 514. In 1861, it was provided by 24 Vict. c. 10, § 13, that whenever any ship or vessel or the proceeds thereof are under arrest of the High Court of Admiralty, the said court shall have the same powers as are conferred upon the High Court of Chancery in England, by the 9th part of the Merchants' Shipping Act of 1854.

<sup>5</sup> *Thisseldon v. Gibbons*, 8 Dowl. P. C. 419, *nom.*, *Thistleton v. Gibbons*, 4 Jur. 629.

<sup>6</sup> *Hill v. Audus*, 1 Kay & J. 263.

in chancery, he is allowed his costs, but is entitled to no other preference over the other claimants, and must share ratably with them in the value of the ship and freight.<sup>1</sup>

Since the liability of the owners of a vessel is limited by statute, the fact that, if the vessel is arrested, they give bail to a larger amount, does not increase their liability.<sup>2</sup>

If a collision takes place on the high seas between two American vessels, the one in fault cannot in England claim the benefit of the English statutes.<sup>3</sup> So if the collision is between an American and an English vessel, the owners of the former cannot set up either the English or American statutes as limiting their liability.<sup>4</sup> But if the collision takes place between a British and a foreign vessel within three miles of the British coast, the British vessel is entitled to the benefit of the statute.<sup>5</sup>

The questions of difficulty which arise under the third and fourth sections may be stated as follows:—

First, At what time is the value of the ship and freight to be estimated.

Second, Does the same rule apply to cases of a breach of a contract of affreightment and those of collision, under the third section?

Third, How far does the right of abandonment given by the fourth section correspond with the provisions of the maritime law, and what effect does it have upon the third section as determining the time when the value of the ship and freight is to be taken?

Fourth, Is an abandonment allowed in a case of collision under the fourth section?

Fifth, In what court may “appropriate proceedings” be taken?

Sixth, Is a part owner of a vessel liable for the value of the entire vessel, or only for the value of his interest in the same.

It is a primary rule in the interpretation of a statute, that all the sections thereof are to be construed together, because one section may often be explanatory of another.<sup>6</sup>

<sup>1</sup> *Leycester v. Logan*, 3 Kay & J. 446.

<sup>2</sup> *The Richmond*, 3 Hagg. Adm. 431; *The Mary Caroline*, 3 W. Rob. 101, 105; *The Duchesse de Brabant*, Swabey, Adm. 264.

<sup>3</sup> *Cope v. Doherty*, 4 Kay & J. 367, affirmed, 2 De G. & J. 614.

<sup>4</sup> *The Wild Ranger*, Lush. Adm. 553.

<sup>5</sup> *General Iron S. C. Co. v. Schurmanns*, 1 Johns. & H. 180.

<sup>6</sup> See *The Dundee*, 1 Hagg. Adm. 109, 121; *Watson v. Marks*, U. S. D. C. Penn., 2 Am. Law Reg. 157.

First. At what time is the value of the ship and freight to be estimated?

This question was not raised in England until after the statute of 52 Geo. III. c. 59, was passed. The language of this statute differs somewhat from the language of the preceding statutes, and is as follows: "Further than the value of his or their ship or vessel, and the freight due or to grow due for and during the voyage which may be in prosecution, or contracted for at the time of the happening of such loss or damage."

The question first discussed was in respect to the time at which the value of the ship and freight were to be taken, in a case where the master improperly sold the cargo and terminated the voyage, and the court held that the value at the time of the loss, and not that at the commencement of the voyage, was to be taken.<sup>1</sup> All the subsequent cases in England, where the time at which the value should be taken has been discussed, have been cases of collision, and it has been held that the value existing immediately prior to the occurrence of the accident is that on which the liability of the owners is to be based, even though the vessel in fault sunk immediately after the collision.<sup>2</sup>

The question we are now considering has been much discussed in this country, and it has been held that in a case of collision, the value of the vessel and freight is to be taken just before the collision took place;<sup>3</sup> and in the case of a wrongful sale of the cargo by the master in a foreign port, the value which the vessel and freight had at the time is to be taken.<sup>4</sup>

Second. Does the same rule apply to cases of a breach of the contract of affreightment and those of collision under the third section?

In cases of contracts of affreightment the right of action may accrue at different times, according to circumstances. Thus, if on a voyage the goods are embezzled, it may well be that the right does not accrue till the end of the voyage, because the master may

<sup>1</sup> *Wilson v. Dickson*, 2 B. & Ald. 2. This decision was affirmed in a subsequent case, under similar circumstances. *Cannan v. Meaburn*, 1 Bing. 465.

<sup>2</sup> *Brown v. Wilkinson*, 15 M. & W. 391; *The Mary Caroline*, 3 W. Rob. 101; *Leycester v. Logan*, 3 Kay & J. 446.

<sup>3</sup> *Walker v. Boston Ins. Co.* 14 Gray, 288.

<sup>4</sup> *Spring v. Haskell*, 14 Gray, 309.



obtain possession of the goods and deliver them, in accordance with the terms of the bill of lading.<sup>1</sup> But where the goods are wrongfully sold by the master and the voyage broken up, we think it equally clear that the right of action accrues at once, and that the value of the ship and freight should be estimated at that time.<sup>2</sup>

Third. How far does the right of abandonment, given by the fourth section, correspond with the provisions of the maritime law, and what effect does it have upon the third section, as determining the time when the value of the ship and freight is to be taken ?

In a case under the Maine statute of 1840, it was held, that if the decree exhausted the whole value of the ship and freight, the owner by abandoning would be discharged from all personal responsibility.<sup>3</sup> The language, however, of Mr. Justice Story, in a subsequent case under the Massachusetts statute, tends to show that the value of the ship and freight in cases of tort, as well as in cases of contract, is to be taken at the time when the right of action accrues to the injured party.<sup>4</sup>

<sup>1</sup> See *Watson v. Marks*, U. S. D. C. Penn., *Kane*, J., 2 Am. Law Reg. 165.

<sup>2</sup> *Spring v. Haskell*, 14 Gray, 309. See also *Pope v. Nickerson*, 3 Story, 465 ; *Wilson v. Dickson*, 2 B. & Ald. 2 ; *Cannan v. Meaburn*, 1 Bing. 465.

<sup>3</sup> *Stinson v. Wyman, Daveis*, 172. The action in this case was on a bill of lading to recover for damage done to goods by their being improperly carried on deck. It was also held that the statute was intended to limit the responsibility of the owner for losses occasioned by the fault or negligence of the master, as well as for those which arise from direct and wilful fraud.

<sup>4</sup> *Pope v. Nickerson*, 3 Story, 465. The action in this case was *in personam* against the owners of the vessel to recover a cargo of fruit and wine consigned to the plaintiffs. The vessel sailed in a seaworthy condition, but was obliged, on the voyage, to put into an intermediate port in distress. Part of the cargo, which was in a damaged condition, was sold, and the proceeds applied to defraying the expenses of repairing the vessel. This amount not being sufficient, the master obtained the rest on a bottomry bond intended to cover the vessel, cargo, and freight. The vessel then sailed, but was obliged to put back, and the rest of the cargo, part of which was in a perishing condition and part not, was sold together with the ship. The proceeds of vessel and cargo were applied to the payment of the bond, and the surplus paid over to the master. There were three questions presented under the statute of Massachusetts. First, whether the statute applied to cases of contracts made by the master within the scope of his authority. Second, admitting the statute applied, at what time the value of the ship and freight was to be taken ; and, third, as to the time of the valuation in case of tort. On the first point Mr. Justice Story was of the opinion, in accordance with the

The first question is, whether the last part of the fourth section, which commences, "And it shall be deemed a sufficient compliance with the requirements of this act," applies solely to the former part of the same section, or to the third section. If the former construction be the true one, the right of abandonment is but an extension of the right given by the English and American statutes alike of applying to the court where there are several claims pending or apprehended. So that the ship-owner has the right of ceasing to be a party to the suit by transferring his interest to a trustee. The term "for such claimants" would seem clearly to refer to the claimants mentioned in the former part of the section, and not to extend to the third section, in which the word does not occur. It may be said that since the trustee is authorized to hold for the benefit of "the person or persons who may prove to be entitled thereto," it follows that the act had reference to a case where there was but one claimant, and this could only be under the third section. But the answer is, that although there be several claimants, yet only one may be entitled to recover, and the word "person" is meant to apply to him.

If, however, we admit that the right of abandonment to a trust-  
authorities cited *ante*, p. 120, note 4, that the statute was not applicable. He then was of the opinion that if the statute did apply to the case where the master appropriated the proceeds arising from the sale of a perishable cargo to the repairing of the ship, the value of the ship and freight was to be taken as it existed at the time of such appropriation, and not subsequently, when it was burdened with a bottomry bond. He said, p. 498: "But at what time is this value to be ascertained and fixed? It must be the value at the time when the right of action against the owners first accrues, and not at any subsequent period. Suppose, after the right of action has attached, the ship perishes, that will not affect the right of recovery of the shipper in a case of tort; and *a fortiori* it will not in a case of contract made by the master, by and under the authority of the owners." In regard to the third question, as to the liability of the owners for the goods finally sold, Mr. Justice Story said, p. 504: "They are liable therefor to the extent of their interest in the schooner and freight, and no further, at the time of the misconduct and tortious sale. But at that very time the ship was under a bottomry bond greater than her value, and by the breaking up of the voyage, and the sale of the schooner, the bond became absolutely due to the bondholders. These were acts of the master contemporary with the voluntary sale of the cargo, and indeed they may all be treated as one and the same transaction, constituting parts of the *res gestæ*, and done, as it were, *uno flatu et uno intuitu*. So that, at the time, the owners had, in effect, no interest whatsoever in the schooner or freight, but the value of both had been exhausted."

tee does not exist where there is only one demand against the vessel, yet the fact that there may be an abandonment where there are several demands must have a material bearing upon the question of value under the third section, unless we construe the right of abandonment in any case to mean merely the transfer of the amount of liability of the owner. Otherwise a ship-owner may be liable for a large amount if there is one freighter, and liable for a small amount if there are two freighters; and this could hardly have been the intention of Congress. So, too, in regard to the exercise of this right. If we hold that a ship-owner can abandon a damaged ship, and be released from all further liability, it would seem to follow that he should not be held for any greater amount if his vessel is entirely lost, and he has nothing to give up.<sup>1</sup>

Fourth. Is an abandonment allowed in a case of collision under the fourth section?

The first part of this section provides for the case of "any such embezzlement, loss, or destruction," being suffered "by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage." The third section embraces three classes of cases:—First. "Embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel." Second. "Any loss, damage,

<sup>1</sup> This is so held in *Watson v. Marks*, U. S. D. C. Penn., 2 Am. Law Reg. 157. The libel was *in personam* upon a contract of affreightment. The vessel was wrecked on the coast of California, and at some time, either shortly before or after she struck, the goods of the libellant were stolen by some person unknown. *Kane, J.*, said, p. 163: "But whether the robbery preceded or followed the moment of wreck, or was contemporaneous with it, is in my judgment of no importance." This opinion proceeds on two grounds; first, that aside from the fourth section of the statute the value of the ship and freight is to be taken at the time the right of action accrued to the shipper, and that "the right of action, in a contract of affreightment against the carrier, unlike that which grows out of a collision, does not accrue till the end of the voyage, or the lapse of a reasonable time for the delivery of the cargo." And second, because under the fourth section the measure of the ship-owner's liability must be, "in cases of affreightment at least, the value of the vessel and freight at the time of suit brought." The reason given for this is, that the transfer of his interest could not pass more than he had at the time. In *Spring v. Haskell*, 14 Gray, 288, it is, however, held, that the clause relative to abandonment only applies where an abandonment is actually made, and is of no effect if the vessel is totally lost before reaching her port of final destination.

or injury by collision." Third. "Any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners." Suppose, then, that a vessel with a cargo on board, through the negligence of her officers, runs into another vessel. The owners of the first vessel are liable to the owners of the second, and are also liable to the freighters on board their vessel, and to the freighters on the other vessel. Can the owners of the first vessel, by abandonment, free themselves from all further liability?

Under all the preceding statutes an apportionment was allowed where several persons were concerned, in all cases where the liability was limited, if there was only one person who had sustained an injury. Thus the language of 7 Geo. II. c. 15, is, "If several freighters . . . shall suffer any loss by any of the means aforesaid." And in the 53 Geo. III. c. 157, which applies to a loss by collision, the language is, "By any means for which the responsibility of any owner or owners is limited by this act as aforesaid." It may, therefore, be questioned whether the word "loss" in the fourth section was not intended to cover every kind of loss mentioned in the previous section, occasioned or incurred without the privity or knowledge of the ship-owners.<sup>1</sup>

<sup>1</sup> In *Walker v. Boston Ins. Co.* 14 Gray, 307, *Merrick, J.*, held that the right of abandonment was limited to the case of losses sustained by freighters or shippers of property put on board the vessel, in consequence of its embezzlement or destruction by the master, mariners, or passengers on board the ship. So in *Barnes v. Steamship Co.* U. S. C. C. Penn., 1868, *Grier, J.*, *Legal Intelligencer*, June 19, 1868, where a vessel belonging to the defendants ran into another vessel, and both were sunk, and suits were brought against the defendants by the owners of the other vessel and by owners of cargo on their own vessel, it was held that the fourth section of the act of 1851 had no application to either of these claims. In *Wright v. Norwich Transp. Co.* 1 Bened. Adm. 156, *Shipman, J.*, a suit *in personam* to recover damages for the loss of a schooner and her cargo, caused by a collision with a steamboat owned by the respondents, it was contended that the liability limited by the act, so far as it relates to collision, was confined to damages done to property on board the faulty vessel; that the sole object of Congress was to relieve the owners, whose vessel may be in fault, from the unlimited liability to which they would otherwise be held as common carriers. But it was held that the act applied to all cases of collision, and *Shipman, J.*, said: "The reasons for limiting the liability for injuries resulting to other vessels and their cargoes are just as weighty as those for limiting it for injuries done to the cargoes of the vessels in fault. Collisions are frequent, their hazards great, and the injuries inflicted upon other vessels and cargoes often far exceed the value of the faulty ship and

Fifth. In what court may appropriate proceedings be taken ?

The language of the statute upon this subject is very broad ;—

her pending freight. The disaster out of which this controversy has sprung presents an instructive lesson on this point. Had the libellants' vessel been condemned as in the wrong, her owners, according to their present argument, would have been liable for the whole amount of damages done to the City of Norwich and her cargo, exceeding by many times over the amount or value of their interest in the *Van Vliet*. The owners of the latter would not only have lost their vessel and her pending freight, amounting to over \$ 20,000, but would have been responsible to other parties for probably \$ 100,000 more. It was against just such calamities, out of all proportion to the magnitude of the capital invested, that I understand this act to provide." The fourth section of the act was considered to apply to cases of collision. *Shipman, J.*, said : " It was undoubtedly foreseen by Congress that in cases of embezzlement and kindred torts, and in cases of collision, there would arise instances where several different parties would have claims for damages against the owners of a vessel, exceeding her value in the aggregate, and would very likely endeavor to enforce them in separate suits and in different tribunals, and in order to protect the interest of all parties it was necessary that there should be some way provided by which the amount to which the liability of the owner is limited should be distributed among those entitled to recover in proportion to their respective claims. This state of things would exist, or at least might exist, whenever property on board either one or both colliding vessels, belonging to parties other than such owners, was destroyed or injured, and the whole amount of damage should exceed the value of the faulty vessel and her pending freight. Indeed, it might occur where one vessel strikes two others in the same collision, as has more than once happened, and the owners of each injured vessel should bring a separate suit. The language of this fourth section is therefore very broad, and extends the power of taking proceedings for an apportionment to the owner of the faulty vessel, and to the several owners or freighters of any property whatever lost or destroyed by the tortious act of those on board. Whenever, therefore, there are several claimants for damages arising out of the same tortious act, who have brought, or may be entitled to bring, separate suits, the necessity for apportioning the amount for which the owners of the vessel in fault are liable, arises. The respondents in the present suit find themselves in that condition. In addition to the claims of these libellants, upon which large damages have been awarded against them, they are liable, assuming the judgment of this court as to the cause of the collision to be correct, to freighters or owners of goods on the City of Norwich for a much larger amount ; and they aver that the whole sum for which they are thus liable exceeds the value of their interest in their boat and pending freight at the moment preceding the collision. They are entitled, therefore, to take proceedings to have the amount for which they are liable apportioned among the parties entitled thereto. This is one species of relief which the act intended to provide. The other, the transfer of the ship and freight to a trustee, they have not resorted to, and, therefore, nothing need be said on the subject." Relief was, however, denied upon another ground. See *post*, p. 135, n. 1.

“ And for that purpose the said freighters and owners of the property, and the owner or owners of the ship and vessel, or any of them, may take the appropriate proceedings *in any court*.” The term “ any court ” must, however, we think, mean any court which, by its form of process, and the general nature of its jurisdiction, is adapted to giving the relief intended by the act ; and this is a court having equity powers.<sup>1</sup>

<sup>1</sup> In *Wright v. Norwich Transp. Co.* 1 Bened. Adm. 156, *Shipman, J.*, the schooner *S. Van Vliet*, owned by the libellants, and the steamboat *City of Norwich*, owned by the respondents, came into collision in Long Island Sound. The collision sunk the schooner, and both she and her cargo were lost. The steamboat was greatly damaged by the blow, and soon after took fire and sunk. She had on board a valuable cargo which was lost. The steamer was subsequently raised and repaired at great expense.

A libel *in personam* against the owners of the steamboat was filed, and after answer and full hearing, the steamboat was held in fault, and a decree entered against her owners, with an order of reference to a commissioner to compute the damages to the owners, both of the schooner and her cargo, and report the same to the court. The commissioner heard the parties and made a special report. Upon motion that the court confirm the report, counsel were heard upon the questions of law raised pertaining to that branch of the case.

The report was confirmed, and the damages of the owners of the schooner fixed at \$ 19,975, and those of the owners of the cargo at \$ 1,921.63.

At this point, however, the respondents moved the court to reserve the final decree, that they might “ take appropriate proceedings ” and offer evidence to this court “ for the purpose of apportioning the sum for which the owners of the steamboat may be liable, among the parties entitled thereto.” The respondents claimed that they had laid the foundation for this proceeding in their answer by averring that the damages resulting from this collision to third parties greatly exceed the value of their boat and her freight then pending. No formal steps were taken by way of presenting evidence to the court of the amount of the claims of those whose property was on board the boat which was in fault, and injured or destroyed by her taking fire and sinking, but, upon suggestion of the court and by consent of counsel, such evidence was considered as offered under this motion and objected to, and the general question of the right of the respondents to relief and the power of the court to grant it, was argued at length.

It was held that a court of admiralty was not the proper court for such a proceeding. *Shipman, J.*, said : “ The power given to parties, to protect their rights by an apportionment of the sum for which the owners of the vessel are liable, is expressed in vague and uncertain terms, both as to the nature of the proceedings to be taken and the court which is to administer them. We are, therefore, brought to the consideration of our last question, how far this court can grant the relief which this act intended to provide. The language of the act is, that the parties authorized, or any one of them, ‘ may take the appropriate proceedings in any court

Sixth. Is the part-owner of a vessel liable for the value of the entire vessel, or only for the value of his interest in the same?

for the purpose of apportioning the sum,' &c. What is here meant by 'appropriate proceedings'? It is reasonable to suppose that Congress, by this language, referred to some course of legal procedure already known to the law, and administered by some distinct tribunal, according to a settled practice. As this act was framed with full knowledge of the various English acts relating to the same subject, and was intended to accomplish substantially the same result, we may infer that the appropriate proceedings contemplated were substantially such as have been employed in the enforcement of the English act. These were equity proceedings, administered by the High Court of Chancery. That tribunal was empowered to entertain suits of this character, and to draw the whole controversy within its jurisdiction, by stopping actions in all other courts relating to the same subject-matter. The most ample powers were conferred on that court to enable it to make a complete, effectual, and final disposition of the litigation, so as to bind all parties in interest. These powers were transferred to the High Court of Admiralty in 1861. . . . Some such powers as those exercised by the English courts must be possessed and employed by whatever tribunal effectually administers this act of Congress. It must be able, by a binding decree, to settle the whole controversy, and conclude the parties in interest. Now our present inquiry is, whether this court possesses powers commensurate with such a task? Waiving now the question whether, if it had the power at all, it could proceed to exercise it in connection with, and as a part of the present suit, I pass to the inquiry, whether it can do so under any form of proceeding, unless its jurisdiction is first enlarged. It is true that this section says that the parties, or any of them, 'may take the appropriate proceedings in any court for the purpose of apportioning,' &c. Of course these words 'any court,' are not to be taken in their literal sense. From necessity we must restrict and qualify them at the start. A court whose jurisdiction is exclusively criminal, cannot be deemed within their meaning. No one will doubt that civil, as distinguished from criminal tribunals, alone were indicated. Nor can we suppose for a moment that it was intended by this act to authorize a resort to all civil courts. Tribunals of limited and inferior jurisdiction, like probate, surrogate, or local city courts, are not within the meaning of these words, although within their literal expression. They undoubtedly refer, as the latter clause of this section, when providing for the transfer of the vessel to a trustee, designates to courts of competent jurisdiction, tribunals having a range of authority and a mode of procedure adequate, or at least adapted, to accomplish the purposes the act had in view. Now the only courts of a character at all resembling this description, are courts possessing a general equity jurisdiction. Whether even such courts, as constituted in this country, are, without the aid of special legislation, adequate to this task, I do not now stop to inquire. Nor do I pause to ask the question, whether the equitable jurisdiction of any other court of the United States, as the law now stands, is equal to the work. It is sufficient for me here, to determine whether this court has any such power. I answer unhesitatingly, that it has not.

The words of the statute are : " That the liability of the owner or owners . . . shall in no case exceed the amount or value of the

It does not pertain to its jurisdiction in admiralty; certainly not in a suit *in personam*, where neither the faulty ship and freight, nor their amount or value, are within the control of the court. In a suit *in personam*, it can render no judgment that would bind parties not before it. None of these freighters are parties to this suit, and it is doubtful if this court has power to make them parties. Certainly it has no power to make parties of such as reside and remain beyond the limits of this district.

" It is hardly necessary to add that this court has no equity powers adequate to the exercise of the duty supposed to be conferred upon some court by this section of the act. Its jurisdiction depends upon the acts of Congress, and with the exception of a single subject-matter, no equity jurisdiction has ever been conferred upon it. I presume it will hardly be contended that, because Congress has authorized, in terms, appropriate proceedings to be taken in any court, it has, by implication, conferred upon every court powers adequate to the work of effectually administering this act. And if it has not, this court is without jurisdiction, without rules of practice, and without the power to make such rules adapted to accomplish the object of the statute and give effectual relief to the parties interested in the sum for which these respondents are liable, as damages for this collision.

" The conclusion is that the court has no power to grant the relief asked for on this motion, or under any form of proceeding that could be instituted. The evidence offered is therefore rejected, and the motion denied. And as it is conceded that the value of the City of Norwich and her pending freight, at the time of the collision, was much greater than the damages assessed in this case, a decree must be entered for the libellants for the sum fixed by the court on confirming the commissioner's report."

In The City of Norwich, 1 Bened. Adm. 89, which was a suit growing out of the collision mentioned in the preceding case, an action *in rem* was brought against the steamboat by an owner of goods shipped on the steamboat. While the vessel was in the custody of the court, the claimants filed a petition setting forth that the losses by the collision and fire exceeded the value of the vessel and freight then pending, and that there was reason to anticipate actions against her to recover amounts exceeding her value, and prayed for leave to file a stipulation in the appraised value of the vessel and freight, such stipulation to be taken for the benefit of all persons who should show themselves entitled to liens upon the vessel for losses occasioned by the collision and fire aforesaid, and that upon the filing of such stipulation the vessel be declared discharged of such liens. They further prayed that the owners of said vessel might be declared to be entitled to the benefit of the act of 1851, and be also declared, upon the filing of the stipulation aforesaid, to be discharged from all liability for any losses arising out of the accident in question. It was held that the discharge of the vessel from the liens created by law, on giving a stipulation, could not be obtained by virtue of the act of 1851; that the provisions in the fourth section, authorizing the owners to take



interest of such owner or owners respectively." The fourth section provides that "the said freighters and owners of the property and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings," &c., and that "he or they may transfer his or their interest to a trustee." A question may arise under the fourth section whether one part-owner of a vessel can institute proceedings. The words "or any of them" may mean any of the classes mentioned. By the act of 7 Geo. II. c. 15, the limitation of liability is "the value of the ship or vessel"; and if any of the owners bring a bill in equity for an apportionment, they are obliged to bring it on behalf of themselves and the other owners, and to pay into court the value of the vessel. The language of the other English acts is similar. The Massachusetts act of 1818 and the Maine act of 1821, are taken from the act of 7 Geo. II. and their corresponding sections are almost word for word the same with that of 7 Geo. II. except this notable difference:— In 7 Geo. II. the limitation is, "the value of the ship or vessel." In the Massachusetts and Maine acts the language is, "The value of the interest which such owner or owners have or had at the time of such shipment in the ship or vessel." This language fixes clearly the time of ascertaining the value, and we think the intention is also clearly manifest to fix the amount for which each owner shall be liable to the value of his interest.

These statutes, however, provided that the whole value should be brought into court in case a bill of equity was brought, following the language of the 7 Geo. II. and making the sections inconsistent with each other. The inconsistency exists in the Revised

"appropriate proceedings," does not warrant this application; that a court of admiralty could not in an action *in rem* against a vessel by a single freighter, make, upon a petition, a summary order declaring the owners of the vessel free from personal liability to any freighter on filing a stipulation as proposed; that the "appropriate proceedings" must be *in personam*, bringing the parties to be affected by it before the court; that such a proceeding would not be within the jurisdiction of an admiralty court, and that the relief sought could not be afforded under any of the provisions of the act of 1851, but that the application might be treated as one for a release of the vessel on bail; that under the circumstances, a stipulation in the form tendered would protect all the rights of the lien creditors, and as effectually relieve the vessel from all the liens provided for in it, as the ordinary stipulation does from the claims made in the particular libel; that therefore the application to bond the vessel in this way might be granted.

Statutes of Massachusetts, but does not in the Revised Statutes of Maine, from which the Act of 1851 was taken.

If there should be any limitation of the liability of ship-owners, it seems to be just that the liability of a part-owner should be limited to the value of his interest.

A different view has, however, been taken in Massachusetts, and it is held by the supreme court of that State that a part-owner is liable for the full value of the vessel.<sup>1</sup>

And it is held by the same tribunal that the value of the owner's interest, under the third section, is its value unincumbered, and that no allowance is to be made for a mortgage.<sup>2</sup>

In respect to the "freight then pending," it has been held that the earnings of the vessel in transporting the goods of the owners are to be included.<sup>3</sup> And if the cargo is damaged by the unseaworthiness of the vessel, it has been held that the owner of the vessel cannot abandon his interest in the vessel, because he is presumed by law to be cognizant of such unseaworthiness, and the loss is therefore not "without his privity or knowledge."<sup>4</sup> If the owner of the vessel is not owner of the freight, the freight does not contribute to the loss.<sup>5</sup>

Section 5 provides that the charterer of a vessel, if he mans, victuals, and navigates such vessel at his own expense, or by his own procurement, shall be deemed the owner of such vessel, within the meaning of the act; and such vessel, when so chartered, shall be liable in the same manner as if navigated by the owner.

There is no similar section in the English statutes. The early Maine and Massachusetts statutes contained like provisions, and the Maine act of 1821 also contained a provision giving the owner of the vessel a right of action against the charterer to recover the

<sup>1</sup> *Spring v. Haskell*, 14 Gray, 309.

<sup>2</sup> *Spring v. Haskell*, 14 Gray, 309. So in *Barnes v. Steamship Co.* cited *ante*, p. 133, n. 1, *Grier, J.*, held that the owners of the vessel injured had a right to priority of payment out of the fund, without any deduction for or on account of bottomry, mortgage, pilotage, towage, seamen's wages, or other contracts of the masters or owners of the vessel doing the damage. See, however, *Pope v. Nickerson*, 3 Story, 465.

<sup>3</sup> *Allen v. Mackay*, 1 Sprague, 219.

<sup>4</sup> *In re Sinclair*, U. S. D. C. South Carolina, 8 Am. Law Reg. 206.

<sup>5</sup> *Walker v. Boston Ins. Co.* 14 Gray, 288.

value of the vessel, in case a loss was compensated for from the freight or the proceeds of the sale of the vessel. By the Maine statutes of 1840, the right was further extended, so as to give the owner of the freight a claim against the charterer, if the freight made compensation. It has been held that if the freight is owned by a person other than the owner of the ship, the owner of the freight is not liable if he does not man, victual, and navigate the ship.<sup>1</sup>

Section 6 provides, that the act shall not affect the remedy against the master and mariners, and is taken partly from the Revised Statutes of Maine,<sup>2</sup> and partly from the 53 Geo. III.<sup>3</sup> Under this last-mentioned statute it has been held that if a part-owner is in command of the vessel, his negligence does not deprive the other part-owners of the benefit of the statute.<sup>4</sup>

Section 7 provides, that any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering at the time of shipment a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars.

It is then provided that, "This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation."

The last part of this section follows the language of 53 Geo. III.<sup>5</sup> It has been held that a vessel on Lake Erie, bound from Buffalo to Detroit, enrolled and licensed for the coasting trade, and engaged in navigation and commerce as a common carrier between ports and places in different States upon the lakes and navigable waters connecting the same, is not a vessel used in inland navigation.<sup>6</sup>

<sup>1</sup> *Walker v. Boston Ins. Co.* 14 Gray, 288.

<sup>2</sup> 1840, c. 47, § 11.

<sup>3</sup> Ch. 159, § 4.

<sup>4</sup> *Wilson v. Dickson*, 2 B. & Ald. 2.

<sup>5</sup> Ch. 159, § 5. This also excepted "any ship or vessel not duly registered according to law."

<sup>6</sup> *Moore v. American Transp. Co.* 24 How. 1, 5 Mich. 368. See also *Walker v. Transp. Co.* 3 Wallace, 150. See, under 26 Geo. III. c. 86, *Hunter v. McGown*, 1 Bligh, 573.

## CHAPTER XVIII.

## OF MATERIAL MEN AND THEIR LIENS.

THE persons employed to repair a ship, or, in general, to do any work about her, and those who furnish for her use supplies of things necessary to her equipment and safe navigation, are known in the law of shipping as material men; they are defined in Jacobsen's Sea Laws<sup>1</sup> as "the persons who furnish and construct the different materials of a ship"; but a somewhat broader sense is usually given to this phrase, and Lord Stowell, in one case, cited a report of Sir Leoline Jenkins, made to the king, in which that learned judge said: "Those are commonly called material men, whose trade it is to build, repair, or equip ships, or to furnish them with tackle and provision necessary in any kind."<sup>2</sup>

We propose in this chapter to consider the liens of material men so far as they exist at common law, or are given by State statutes, reserving the consideration of the lien given by the maritime law, and the enforcement of the lien given by the State laws, by a court of admiralty, for our chapters on Admiralty Jurisdiction.

In England, from the time of Charles II. until 1840, the lien of a material man was limited to the case of a shipwright or other person to whom possession of the ship had been given for the purpose of repair; he might retain his possession for his wages or charges as any other workman may any chattel (a tailor, clothing; a watchmaker, a watch), by the common law of bailment.<sup>3</sup> In England it has been held that if material men, who repair a vessel, retain possession of her and claim a common-law lien for the repairs made, they cannot add to this charge the expense of keeping the vessel, since they keep her for their own benefit.<sup>4</sup> But we

<sup>1</sup> Page 357, note.

<sup>2</sup> The Neptune, 3 Hagg. Adm. 129, 142.

<sup>3</sup> *Ex parte Bland*, 2 Rose, 91; *Franklin v. Hosier*, 4 B. & Ald. 341; *The Vibia*, 1 W. Rob. 1, 6. But he cannot detain the vessel against the authority of the court of admiralty, when the ship is in the possession of its officer, though that court will then protect his rights. *The Harmonie*, 1 W. Rob. 178.

<sup>4</sup> *Somes v. British Empire Shipping Co.* 8 H. L. Cas. 338.

know of no reason why the material men could not maintain an action against the ship-owners for any damages they might suffer in this way from their neglecting to take away the vessel when repaired, and pay for the repairs.

This common-law lien is undoubtedly in force in this country.<sup>1</sup>

Many of our States have, by statute, given a lien to material men against ships in their home ports.<sup>2</sup> We must refer to these statutes for their especial provisions, which do not, however, generally differ very much from the rules of admiralty in relation to the same lien. We will here state some of the results of adjudication upon them.

In New York the lien of the builder attaches as soon as the structure assumes the form of a ship.<sup>3</sup> The statute does not apply to canal boats.<sup>4</sup> But it has been held to apply to an old steamboat which was fitted up as a theatre, and used as such at different river ports, and the vessel was held liable though some of the supplies were furnished for the theatre.<sup>5</sup> A debt for goods furnished is not contracted till the goods are actually delivered, and an

<sup>1</sup> *Nicholson v. May*, Wright, 660; *The General Smith*, 4 Wheat. 438, per *Story*, J.; *The Sch. Marion*, 1 Story, 68.

<sup>2</sup> Maine, Rev. Stats. c. 91, §§ 6 - 14; New Hampshire, Compiled Statutes of 1853, tit. xv. c. 139; Massachusetts, Acts of 1848, c. 290, Acts of 1855, c. 231, Gen. Stats. 1860, c. 151; New York, 2 Rev. Stats. Denio & Tracy's ed. 733, Act of 1855, c. 110, amending the preceding statute, and Act of 1858, c. 247, providing for the registry of liens and incumbrances upon boats navigating the canals of the State; Laws of Pennsylvania, Dunlop's ed. 681, Act of 1858, No. 404; Georgia, Cobb's Dig. 426, Act of 1852, No. 137; Alabama, Code of 1852, p. 491; Florida, Stat. of 1847, Thompson's Dig. 413, Act of 1848, c. 268, Act of 1850, c. 406; Arkansas, Rev. Stats. c. 14; Tennessee, Act of 1833, c. 35; Kentucky, Act of 1839, c. 1088, Act of 1841, c. 267; Statutes of Ohio, Swan's ed., 1854, c. 26, p. 185; Compiled Laws of Michigan, 1857, c. 149, vol. 2, p. 1313; Indiana, Rev. Stats. 1852, vol. 2, p. 183; Illinois, Rev. Stats. 1845, p. 71, ed. of 1858, vol. 2, p. 785; Missouri, Rev. Stats. 1855, vol. 1, p. 302; Iowa, Code of 1851, p. 293, Act of 1854, c. 125; Wisconsin, Rev. Stats. 1849, c. 116; Laws of California, First Session, p. 189, c. 75, § 2, Compiled Laws of 1853, p. 576, c. 6, § 318. In Louisiana, a similar privilege exists under the general Spanish law. See *Bourcier v. Schooner Ann*, 1 Mart. La. 165. See also *The Civil Code*, art. 2748, and the case of *Peyroux v. Howard*, 7 Pet. 324, 341.

<sup>3</sup> *Phillips v. Wright*, 5 Sandf. 342.

<sup>4</sup> *Many v. Noyes*, 5 Hill, 34. But special provision is made for canal boats by the act of 1858, c. 247.

<sup>5</sup> *Pendleton v. Franklin*, 3 Seld. 508, affirming the same case, *Franklin v. Pendleton*, 3 Sandf. 572.

agreement to deliver is not enough.<sup>1</sup> If the creditor permits the vessel to sail without enforcing his lien, he loses it, but if she sails on a trial trip merely, for the purpose of testing her machinery, this is not a departure within the statute.<sup>2</sup> So, if she leaves the State in a fraudulent manner, at a time when she was not legally liable to arrest.<sup>3</sup> Where repairs were put on a boat running from New York to Albany, at different times, under one general order to repair the boat when necessary, it was held that the contract was not an entire or indivisible one, but that each job constituted a separate debt, and that every trip of the boat was a departure within the statute.<sup>4</sup> It is sufficient to give a lien under the statute for money advanced for supplies furnished to a vessel in her home port, that the items of account amount in the aggregate to fifty dollars; and it is not necessary that each item should amount to this sum.<sup>5</sup> Wood for fuel has been held in New York not to be included within the term "supplies."<sup>6</sup> But in Illinois the point has been determined the other way.<sup>7</sup> And in New York it has been held to come within the term "stores."<sup>8</sup>

In Maine, the lien is on the vessel while building, and continues for four days after she is launched. If the materials are sold on time, and this time has not elapsed at the expiration of the four

<sup>1</sup> *Veltman v. Thompson*, 3 Comst. 438; *The Alida*, Abbott, Adm. 173.

<sup>2</sup> *Hancox v. Dunning*, 6 Hill, 494.

<sup>3</sup> *The Steamboat Joseph E. Coffee*, Olcott, Adm. 401. See also *Nicholson v. May*, Wright, 660. By the statute under which these decisions were made, the debt ceased to be a lien at the expiration of twelve days after the day of departure to a port within the State. And in all cases the lien was to cease immediately after the vessel's leaving the State. This is amended by the act of 1855, so that the lien remains in force till the expiration of sixty days after the return of the vessel to the port at which she was when the debt was contracted, but in all cases the lien ceases immediately after the vessel leaves such port, unless, within ten days after such departure, a specification of the lien is sworn to and filed in the county clerk's office of the county where such lien is created.

<sup>4</sup> *Rockafeller v. Thompson*, 2 Sandf. 395; *The Alida*, Abbott, Adm. 165. The same rule was laid down in a suit against the same boat, for coal furnished at different times under one agreement. *Abbott*, Adm. 173. See also *The Jenny Lind*, 3 Blatchf. C. C. 513.

<sup>5</sup> *The St. Mary*, 2 Blatchf. C. C. 329.

<sup>6</sup> *Johnson v. Steamboat Sandusky*, 5 Wend. 510; *The Fanny*, cited Abbott Adm. 185.

<sup>7</sup> *Clark v. Smith*, 14 Ill. 361.

<sup>8</sup> *Crooke v. Slack*, 20 Wend. 177; *The Alida*, Abbott, Adm. 173, 185.

days, the lien is gone.<sup>1</sup> The materials must be actually used in the construction of the vessel, and it is not sufficient that they were furnished under a representation that they were to be used.<sup>2</sup> The statute does not embrace tools or other articles used by the workmen in doing their work, but only materials which go into the ship and make part of it when finished.<sup>3</sup> Nor has a person a lien who procures insurance on a cargo of timber purchased for and used in the construction of a ship, he being no otherwise interested in the timber. But it would seem that he would have the lien, were he the furnisher of the materials.<sup>4</sup>

<sup>1</sup> *Scudder v. Balkam*, 40 Maine, 291. See also *The Kearsarge*, Ware, 2d ed. 546, 550.

<sup>2</sup> *Taggart v. Buckmore*, 42 Maine, 77. It was also held in this case that if the materials were furnished for one vessel and used in another, the lien would attach to the latter; and that if some of the materials were used and others not, and judgment should be obtained for the amount of the whole, the lien would be waived, as the value of the articles not used would be merged in the judgment, and could not be separated from the other part. In *The Young Sam*, U. S. C. C., 20 Law Rep. 608, Mr. Justice *Curtis* held, that, under the Maine statute, the party furnishing the materials must have reference to some particular vessel, in the construction or repairs of which the lien was intended to be created. And a doubt was expressed whether any case could come within the statute, if the particular vessel had not begun to be built before the sale of the materials. See also p. 146, n. 3. In *Sewall v. The Hull of a New Ship*, Ware, 2d ed. 565, the libellant furnished timber to ship-builders, who at the time were building the vessel against which the lien was sought to be enforced. Nothing was said at the time that the timber was to be used for any particular vessel, and it did not appear that it was charged in the books to this vessel. The court held that no lien existed. So it is not sufficient to prove that the materials were sold for the declared purpose of being used in the building of the vessel, but their positive use must be shown. And if only part was used, the material man must show what that was. *Phillips v. Wright*, 5 Sandf. 342. See also *Clark v. Smith*, 14 Ill. 361. In *The Kiersage*, 2 Curtis, C. C. 421, it was held, overruling the decision of the district court, in the same case, Ware, 2d ed., 546, that if materials are furnished for two vessels being built for the same person, the party furnishing them has not a lien on one vessel for all materials, but only for what was used in the vessel proceeded against, though both the vessels were of the same size and model.

<sup>3</sup> *The Kearsarge*, Ware, 2d ed. 546. In *Ames v. Dyer*, 41 Maine, 397, it was held that no lien existed for materials furnished for the moulds of the ship, or for labor employed in making the same.

<sup>4</sup> *The Kearsarge*, Ware, 2d ed. 546, 549. Judge *Ware*, in this case said: "Another item in the account objected to, is a charge of insurance paid by the libellants on a cargo of timber procured for the ship and used in her construction. Had such a charge been made by the vendor and furnisher of the materials, it

The Massachusetts statute of 1848<sup>1</sup> provided that whenever a debt is contracted for labor performed, or materials used, in the construction or repair of, or for provisions and stores, or other articles furnished for or on account of, any ship or vessel within the State, such debt shall be a lien upon such ship or vessel, and shall be preferred to all other liens thereon, except mariner's wages. It also provides that when the vessel departs from the port at which she was when such debt was contracted, to some other port within the State, such debt shall cease to be a lien at the expiration of twenty days after the day of such departure, and in all such cases such lien shall cease immediately after the vessel shall have arrived in any port out of this Commonwealth.

The term "construction" in this statute has been held to extend to the alterations of a vessel.<sup>2</sup> And where a vessel was sold on a condition, upon the non-performance of which she was to revert to the original owners, and the purchaser took possession and made alterations, and subsequently, by the non-performance of the condition, the vessel reverted to the original owners, it was held that the carpenter who made the alterations, and who was ignorant of the conditions of the sale, had a lien on the vessel.<sup>3</sup>

In a case under this statute, the vessel sailed from Newburyport for Boston, but in consequence of head winds and a dense fog, put into Portsmouth in New Hampshire, and it was held that the lien was lost.<sup>4</sup> This statute only gives a lien upon the vessel to the amount of the materials used in the construction or repair of the particular vessel.<sup>5</sup>

might perhaps, like the freight, be allowed as part of the cost of materials at the place of delivery, unless by the bargain they were to be delivered at the ship-yard of the builders, and then the insurance, as well as freight, would be involved in the price. But the insurance here was procured by a stranger, and if he can claim in this libel, it must be in the character of a material man. But the mere payment of insurance on a cargo of lumber, though actually furnished for the ship and used in the construction, cannot give him the character of a furnisher of materials in the sense of the law."

<sup>1</sup> C. 290.

<sup>2</sup> *The Ferax*, 1 Sprague, 180.

<sup>3</sup> *The Ferax*, 1 Sprague, 180.

<sup>4</sup> *The Sam Slick*, 2 Curtis, C. C. 480, reversing the decree of the District Court, 1 Sprague, 289.

<sup>5</sup> *The Antarctic*, 1 Sprague, 206. See *The Abby Whitman*, Same Court, 17 Law Rep. 822.



In 1855 the act of 1848 was repealed, and one much more comprehensive in its terms was passed.<sup>1</sup> This statute gives a lien to certain persons when money is due to them by reason of any contracts, express or implied, with the *owners* of any ship or vessel, etc. It has been held that the word "owners" means special as well as general owners, so that a person repairing a vessel under a contract made with a special owner, has a lien.<sup>2</sup> It has been held, under this statute, that the materials must be specifically furnished, to be used in a particular vessel, in order to give a lien on that vessel, and it is not enough that they were so used, if not furnished for that purpose.<sup>3</sup> But if furnished for a particular ship, it is not necessary that they should be attached to her.<sup>4</sup>

No lien can be claimed under this statute for timber sold and delivered to the owner in another State, and by him brought into Massachusetts, and there used in building a ship, if there was no express agreement that there should be a lien, or that the timber should be so applied.<sup>5</sup>

A trench excavated in front of the launching ways of a ship for the purpose of deepening the water, does not make part of the launching ways within the statute.<sup>6</sup>

Under the third section of the statute providing for the mode of enforcing the lien in the State court, it has been held that the petition cannot be filed until the sum has remained unpaid sixty

<sup>1</sup> C. 231.

<sup>2</sup> *Hawes v. Bark James Smith*, U. S. D. C. Mass., 1858. The owner of the vessel in this case made a contract of sale by which the vendees were to have possession of the vessel, and if not paid for within a certain time, possession was to revert to the owner. While in the possession of the vendees, repairs were put upon the vessel, and it was held that these constituted a lien upon her, which was enforced after the original owner had resumed possession in consequence of a breach of the condition.

<sup>3</sup> *Rogers v. Currier*, 13 Gray, 129. The lien is given by the statute "for labor performed, *materials used*, or labor and materials furnished, in the construction," &c. The decision was based on the cases under the Maine statute referred to on p. 144, *supra*. See also *Miller v. Robinson*, 2 Allen, 610. It is doubtful if this case would have been so decided if the court had been aware of the decision of Judge *Sprague* in *The Antarctic*, 1 *Sprague*, 206, decided under the act of 1848.

<sup>4</sup> *Barstow v. Robinson*, 2 Allen, 605.

<sup>5</sup> *Tyler v. Currier*, 13 Gray, 134.

<sup>6</sup> *Woolly v. Ship Peruvian*, U. S. D. C. Mass., 21 Law Rep. 153.

days after it was payable.<sup>1</sup> But in admiralty it has been held that a suit may be brought before the expiration of the sixty days.<sup>2</sup> Interest is allowed on the sum due from the time of filing the petition.<sup>3</sup> A vessel attached under the act of 1855, cannot be appraised and sold during the pendency of the proceedings.<sup>4</sup>

It seems that actual notice of a claim does not dispense with the recording of the claim required by the act, and certainly no actual notice could have this effect which did not give the creditor all the notice he could obtain by the record.<sup>5</sup> The petitioner's statement should give the name of the owner of the vessel if known,<sup>6</sup> and all just credits,<sup>7</sup> and the name of the person with whom the contract is made.<sup>8</sup>

<sup>1</sup> *Tyler v. Currier*, 10 Gray, 54. See also, as to the proper mode of serving the petition, *Patrick v. Tafts*, Superior Court, Suffolk Co., Mass., 21 Law Rep. 163.

<sup>2</sup> *The Richard Busteed*, 1 Sprague, 441.

<sup>3</sup> *Barstow v. Robinson*, 2 Allen, 605.

<sup>4</sup> *Coburn v. Clark*, 3 Allen, 207. See also, generally, *Gove v. Prince*, 3 Allen, 211.

<sup>5</sup> *Hawes v. Mitchell*, Superior Court, Suffolk Co., Mass., 22 Law Rep. 104.

<sup>6</sup> In *Story v. Buffum*, 8 Allen, 35, the question was whether the owner's name was known to the petitioner. He testified that he had heard and believed, when the work on the vessel was begun by him, that A and B owned the vessel; that they both had told him so; that before he filed his statement he had heard that A had become the sole owner, and believed that it was so when he filed his statement; that he knew that in some way the vessel had been transferred to A, though he had no actual knowledge of the execution of any papers. It was admitted that when the statement was filed A was in fact the sole owner of the vessel. Held, that the statement should have stated the owner's name. *Metcalf, J.*, said: "The statute word 'known,' cannot be held to require further knowledge of the owner's name than that which the petitioner had. Absolute knowledge can be had of very few things."

<sup>7</sup> Under the Mechanics' Lien Act of 1851, c. 344, it was held that a certificate was defective if it omitted to credit four dollars actually received. *Lynch v. Cronan*, 6 Gray, 531. By c. 431, act of 1855, it was provided that no inaccuracy in the statement should invalidate the proceedings, unless it should appear that the person filing the certificate had wilfully and knowingly claimed more than his due. The provision was incorporated in General Stats. Mass., 1860, into the chapter relating to ships and vessels. C. 151, § 14. If a person knows that large credits exist, which exceed a certain sum, and knows very nearly, though not exactly, their amount, but gives no further account of them in his statement than that such credits exist, to an amount which is not known and cannot be computed by him, he cannot enforce his lien. *Story v. Buffum*, 8 Allen, 35.

<sup>8</sup> The certificate must state the Christian name, as well as the surname. *Gove v. Sch. Bold Runner*, U. S. D. C. Mass., *Sprague, J.* 1859.

Chapter 251 of the General Statutes of Massachusetts follows the act of 1855 generally. Under section fifteen of this chapter, there would appear to be no necessity of waiting until the sum had remained unpaid sixty days. It is also provided by act of 1862, c. 185, that if a contractor or sub-contractor unreasonably neglects or refuses to pay for labor by him procured to be performed, in constructing, repairing, or launching any ship, upon which a lien shall exist therefor, the owner or other person who made the agreement with such contractor or sub-contractor may pay the debt secured by such lien, and have the same claim against such contractor or sub-contractor as if the said lien had been enforced by judgment of court.

In Pennsylvania the lien continues until the vessel goes to sea, although the owner becomes bankrupt before her departure.<sup>1</sup> Among others mentioned in this statute are ship-chandlers, to whom a lien is given for articles used in the fitting, furnishing, and equipping of a vessel; and it has been held that every debt contracted with a ship-chandler for articles or materials used for any of these purposes is within the law.<sup>2</sup>

If a barge is necessary to a steamboat, its hire to it will be regarded as a material furnished for its equipment.<sup>3</sup> And, in some States money loaned to a person to enable him to build a vessel, gives the lender a lien; in others it does not.<sup>4</sup>

<sup>1</sup> Shoemaker v. Norris, 3 Yeates, 392.

<sup>2</sup> Weaver v. The S. G. Owens, 1 Wallace, C. C. 358. The articles, for which the lien was enforced, were "ropes, ship-tools, sea-stores, provisions, glass and Britannia ware, china, crockery, pencils, varieties of hardware including cooking-stoves, cooking utensils, muskets and other firearms," which last were taken for defence upon a California voyage around Cape Horn.

<sup>3</sup> Amis v. Steamboat Louisa, 9 Misso. 621. Gleim v. Steamboat Belmont, 11 Misso. 112; Steamboat Kentucky v. Brooks, 1 Greene, Iowa, 398.

<sup>4</sup> Lawson v. Higgins, 1 Mann. Mich. 225. See also The Kearsarge, Ware, 2d ed. 546, where it was held that if a creditor advances money to the builder on a mortgage of the vessel, he succeeds to the place of the owner, and takes an interest in the vessel subject to the liens of the material men. Nor is there any lien if the money is loaned to pay wages, and it is actually applied to that purpose. Steamboat P. H. White v. Levy, 5 Eng. 411; or for the use of the boat generally. McGuire v. Canal Boat Kentucky, 20 Ohio, 62; Dewitt v. Schooner St. Lawrence, 3 Ohio State, 325. If the statute of Illinois does apply to such a case, the party lending the money must show that a necessity existed. Leddo v. Hughes, 15 Ill. 41. And in Pearsons v. Tincker, 36 Maine, 384, it was held that if a person pays

In Ohio, if a person has engaged to build and deliver a boat at a future day at a specific price, and has delivered it accordingly, he cannot afterwards proceed against it in the hands of a third person, to recover for materials, supplies, and labor, expended in building it.<sup>1</sup>

In Michigan, there is no lien for supplies furnished while a vessel is being built.<sup>2</sup> In Missouri, if the supplies are furnished on the order of the steward, engineer, or mate, with the knowledge or consent of the master, they are considered as ordered by him.<sup>3</sup>

These statute liens take precedence of the claims of all other creditors.<sup>4</sup> But a laborer employed in general work by a ship-

off the claim of one who has a lien on the vessel, at the request of the debtor, he does not acquire a right to enforce the lien in his own name, or in that of his assignee. And if a person indorse a note given by the master of a vessel for supplies furnished, and pay the same at its maturity, he does not thereby become subrogated to the rights of the person furnishing the supplies, so as to have a lien on the boat. *Hays v. Steamboat Columbus*, 23 Misso. 232. So goods furnished a master of a vessel to supply the place of goods lost in the course of transportation are not "supplies." *Bailey v. Steamboat Concordia*, 17 Misso. 357. But in the same State it is held that a note given for money loaned to a person to enable him to purchase a vessel is a lien upon it. *Steamboat Lebanon v. Grevison*, 10 Misso. 536. So if the money is lent with the understanding that it is to be appropriated to the debts of the vessel, but otherwise not. *Bryan v. Steamboat Pride of the West*, 12 Misso. 371; *Phelps v. Steamboat Eureka*, 14 Misso. 532. So if goods are furnished the master of a boat, to enable him therewith to purchase wood and other necessities, a lien is created. *Steamboat General Brady v. Buckley*, 6 Misso. 558. These cases depend somewhat upon the peculiar provisions of the State statutes under which they were decided.

<sup>1</sup> *Canal Boat Etna v. Treat*, 15 Ohio, 585, 16 Ohio, 276.

<sup>2</sup> *Lawson v. Higgins*, 1 Mann. Mich. 225.

<sup>3</sup> *Voorhees v. Steamboat Eureka*, 14 Misso. 56. See also, generally, *George v. Skeates*, 19 Ala. 738; *Leddo v. Hughes*, 15 Ill. 41; *Steamboat P. H. White v. Levy*, 5 Eng. 411; *Flint River Steamboat Co. v. Roberts*, 2 Florida, 102.

<sup>4</sup> *The Hull of a New Ship, Daveis*, 199; *Sewall v. The Hull of a New Ship, Ware*, 2d ed. 565; *The Kiersage*, 2 Curtis, C. C. 421, 423; *Dudley v. The Steamboat Superior*, U. S. D. C. Ohio, 3 Am. Law Reg. 622. See *The St. Mary*, 2 Blatchf. C. C. 329. In *The Young Mechanic, Ware*, 2d ed. 535, 2 Curtis, C. C. 404, the lien of the material man was preferred to the claim of one who had lent money to the owner for the purpose of building the vessel, and had taken a mortgage from the owner. And this, though the person who employed the libellant was dead, insolvent, and by the laws of the State such a claim was not a preferred debt. See also *The Revenue Cutter No. 1*, U. S. D. C. Ohio, 21

wright or mechanic engaged upon the vessel, and who is employed sometimes on the vessel and sometimes elsewhere, has no lien on the vessel for that part of his labor which is performed upon it.<sup>1</sup>

The question has been considerably discussed whether sub-contractors and day laborers, not employed by the owner, master, or consignee, have a lien for work done, or materials furnished at the request of a person employed by the owner, master, or consignee. In Maine, it is held that such a lien exists in favor of a person performing labor on a vessel.<sup>2</sup> But a doubt has been intimated whether a sub-contractor furnishing supplies would have the same right.<sup>3</sup> In the State courts it has been held that a sub-contractor cannot sue the owner and attach the vessel, but he should sue the person who employed him, and attach the vessel.<sup>4</sup> The lien exists

Law Rep. 281. In *Reeder v. Steamship George's Creek*, U. S. D. C. Maryland, 3 Am. Law Reg. 232, the vessel ran between New York and Baltimore. In the summer of 1854 repairs were put upon her in Baltimore. In December, 1853, she was mortgaged by her owners to parties in New York to secure the payment of \$30,000. This mortgage was duly recorded in the office of the collector of customs at the port of New York, where the vessel was enrolled, and also in the office of the register of conveyances for the city of New York. On the 17th of October, 1854, a decree was passed by the superior court for the city of New York for the sale of the vessel to pay the mortgage debt. This libel was filed on the 18th of the same month. The court held that the lien of the material man might still be enforced.

<sup>1</sup> The *Calisto*, Daveis, 29, s. c. *Read v. The Hull of a New Brig*, 1 Story, 244.

<sup>2</sup> *Purinton v. The Hull of a New Ship*, Ware, 2d ed. 556, 2 Curtis, C. C. 416.

<sup>3</sup> The *Young Sam*, 20 Law Rep. 608, 610, per Curtis, J.

<sup>4</sup> *Ames v. Swett*, 33 Maine, 479; *Atwood v. Williams*, 40 Maine, 409. In *Doe v. Monson*, 33 Maine, 430, an action against the contractor, and the owner as trustee, was sustained. In *Smith v. Steamer Eastern Railroad*, 1 Curtis, C. C. 253, it was held that no lien existed in such a case under the Massachusetts statute of 1848. But in a subsequent case before Judge Sprague, it was held that that decision did not apply to the case of a person furnishing materials to the builder of a ship, he not knowing that the vessel was owned by another party. The *Sam Slick*, 1 Sprague, 289.

In *Smith v. Steamer Eastern Railroad*, the repairs were made on an old vessel known to be owned by parties other than the contractors. The Act of 1855, c. 231, has put the matter at rest by providing that a lien shall exist in all such cases. In the case of The *Brig Whitaker*, 1 Sprague, 229, which seems to follow *Smith v. Steamer Eastern Railroad*, the services were rendered before the passing of the statute, and the vessel was proceeded against as a foreign vessel. But there can be no doubt that in a case under the statute of 1855, under similar circumstances, a lien would exist.

in Ohio.<sup>1</sup> So in Kentucky, unless the owner of the vessel has paid the person who employed the sub-contractors.<sup>2</sup> But there is no such lien in New York, Pennsylvania, or Indiana.<sup>3</sup>

The lien given by a State statute cannot be enforced against the vessel if she is owned by government.<sup>4</sup> That a vessel may be proceeded against, though in the hands of a *bonâ fide* purchaser, is well settled.<sup>5</sup> But in such a case the person claiming the lien must

<sup>1</sup> Webster v. Brig Andes, 18 Ohio, 187.

<sup>2</sup> Stephens v. Ward, 11 B. Mon. 337.

<sup>3</sup> Hubbell v. Denison, 20 Wend. 181; Harper v. The New Brig, Gilpin, 536; Southwick v. Packet Boat Clyde, 6 Blackf. 148. And in Childs v. Steamboat Brunette, 19 Misso. 518, it was held that a ship-carpenter who contracts to repair a boat and furnish materials is not an agent within the meaning of the act concerning boats and vessels, and cannot create a lien on the boat in favor of a party from whom he purchased materials.

<sup>4</sup> Briggs v. Light-Boats, 11 Allen, 157. See, *contra*, The Revenue Cutter No. 1, U. S. D. C. Ohio, 21 Law Rep. 281.

<sup>5</sup> The Schooner Marion, 1 Story, 68, 72; The Barque Chusan, 2 id. 455; Cole v. The Atlantic, Crabbe, 440; Reeder v. Steamship George's Creek, U. S. D. C. Maryland, 3 Am. Law Reg. 232. In The Barque Chusan, Mr. Justice Story said: "The lien, however, which is given by the maritime law on the ship, although it is, or may be treated as, a permanent or abiding lien upon the ship, until the debt is paid, as between the original owners, and the material men and their personal representatives, is liable to a very different consideration, when the ship has passed into the hands of a *bonâ fide* purchaser, for a valuable consideration, without notice of the lien. In respect to such a purchaser, the lien must be enforced within a reasonable time after the debt is due, and the credit, if any, has expired; otherwise a court of admiralty will protect him, as a court of equity would do, against the claim as stale and inequitable. What will constitute a reasonable time, must depend upon the circumstances of each particular case, and is not a point susceptible of any definite or universal formulary of interpretation." In The Sea Lark, 1 Sprague, 571, a chain and anchor were furnished by one vessel to another at the Chincha Islands. Both vessels belonged to Boston. Two years afterwards suit was brought, and as it did not appear that during this time the vessel had been in the United States, it was held that it could be maintained. It was, moreover, said that a mortgagee whose mortgage was made prior to the furnishing of the articles, and who had bought the right of redemption after notice of the furnishing, did not stand in the same situation as a *bonâ fide* purchaser. In The Prospect, 3 Blatchf. C. C. 526, Nelson, J., said: "In order to make out a case that will have the effect to avoid a lien from delay in enforcing it against a vessel, there must be something more than mere lapse of time, — unless indeed the delay be such that the court, in analogy to the statute of limitations would hold the debt to be barred, — there must be unreasonable neglect and delay, operating to the prejudice of third persons, after opportunities have existed to enforce the lien."

use due diligence to enforce his lien.<sup>1</sup> It has been held that the burden of proof to make out such laches as would in law operate to forfeit the lien, is on the claimant.<sup>2</sup>

It has been said that if a person furnishing a ship, gives credit, the lien is discharged, or does not attach, so that a suit *in rem* will not lie to enforce it.<sup>3</sup> But this is stated too broadly. The lien is not waived unless the contract contains stipulations inconsistent with it.<sup>4</sup> Thus if the duration of the lien is fixed by law, and credit is given which extends beyond that time, the lien is considered as waived.<sup>5</sup> But if the credit may expire before the lien, then, whether it is waived or not, is a question of intention.<sup>6</sup> If credit is given for a definite time, the lien is suspended till that time expires, but may be enforced afterwards.<sup>7</sup> So, if it is known to the parties that the time of the credit will expire before the time when the lien must be enforced, the lien is not thereby extinguished.<sup>8</sup> If the material man agrees to take a note on such time that if it were taken it would amount to a waiver of the lien, the agreement does not have this effect if no note is given.<sup>9</sup> If a party furnishing materials before the vessel is completed or named, charges them to the owner on his books, this is no waiver of the lien, it appearing that he had no intention of relinquishing it.<sup>10</sup>

<sup>1</sup> *Leland v. The Medora*, 2 Woodb. & M. 92, 99; *The Utility*, Blatchf. & H. Adm. 218; *The Lillie Mills*, 1 Sprague, 307. In *The General Jackson*, 1 Sprague, 554, *Sprague, J.*, said: "Generally a lien of this character should be enforced soon after the expiration of the first voyage, after supplies or materials furnished, and it is only under peculiar circumstances that it will be extended beyond such time. In this case the supplies were furnished in Boston in 1852, and the libel was not filed until May, 1854, during which time the vessel was plying between Boston and ports in Maine as often as once a month. The rights of a *bonâ fide* purchaser intervening, the libel was dismissed on account of the delay.

<sup>2</sup> *The Prospect*, 3 Blatchf. C. C. 526.

<sup>3</sup> *Zane v. The Brig President*, 4 Wash. C. C. 453.

<sup>4</sup> *Peyroux v. Howard*, 7 Pet. 324, 344; *The Brig Nestor*, 1 Sumner, 73, 80; *Phillips v. Wright*, 5 Sandf. 342.

<sup>5</sup> *Peyroux v. Howard*, 7 Pet. 324, 344; *Remnants in Court*, Olcott, Adm. 382; *Veltman v. Thompson*, 3 Comst. 438; *The Abby Whitman*, U. S. D. C. Mass., 17 Law Rep. 322.

<sup>6</sup> *The Kearsarge*, Ware, 2d ed. 546.

<sup>7</sup> *The Brig Nestor*, 1 Sumner, 73, 85; *The John Walls, Jr.*, 1 Sprague, 178.

<sup>8</sup> *The Antarctic*, 1 Sprague, 206.

<sup>9</sup> *The Highlander*, 4 Blatchf. C. C. 55.

<sup>10</sup> *The Sam Slick*, 1 Sprague, 289.

The giving of a note does not, as a general thing, amount to a waiver of the lien, and the claim will be enforced against the ship if the note is surrendered at the trial.<sup>1</sup> An assignment of a claim by a material man as collateral security, is not a waiver of the lien.<sup>2</sup> And a suit in a State court, with attachment of the vessel on mesne process, does not prevent the plaintiff from afterwards discontinuing the suit, and bringing an action *in rem* in admiralty.<sup>3</sup>

If there are two debts, one secured by a lien, and another not, and a general payment is made by the debtor, without any appropriation thereof at the time it is made, either by the debtor, or by the creditor with the assent of the debtor, the law will appropriate it to the extinguishment of the debt secured by the lien.<sup>4</sup> If credit is given only to the builder or owner of a vessel, there is no lien on the vessel.<sup>5</sup>

<sup>1</sup> The St. Lawrence, 1 Black, 522; Carter v. Sch. Byzantium, 1 Clifford, C. C. 1; The James Guy, 1 Bened. Adm. 117. The Brig Nestor, 1 Sumner, 73, 86; The Chusan, 1 Sprague, 39, 2 Story, 455, 467; Leland v. The Ship Medora, 2 Woodb. & M. 92, 100; Page v. Hubbard, 1 Sprague, 335; Raymond v. The Schooner Ellen Stewart, 5 McLean, C. C. 269; Sutton v. The Albatross, 2 Wallace, C. C. 327; The Schooner Active, Olcott, Adm. 286; The Steamer Fashion, U. S. D. C. Mich., 18 Law Rep. 50; Merrick v. Avery, 14 Arkan. 370; Steamboat Charlotte v. Kingsland, 9 Misso. 66.

The note must be tendered to be given up or actually surrendered at the hearing. Ramsay v. Allegre, 12 Wheat. 611.

In Palmer v. Priest, 1 Sprague, 512, it was held that where a material man, who had trusted two owners of a vessel, afterwards received the negotiable note of one of them, and subscribed at the foot of the account the words "Rec'd payment," this was *prima facie* payment of the account.

<sup>2</sup> The General Jackson, 1 Sprague, 554.

<sup>3</sup> The Paul Boggs, 1 Sprague, 369.

<sup>4</sup> The Antarctic, 1 Sprague, 206.

<sup>5</sup> In The Abby Whitman, U. S. D. C. Mass., 17 Law Rep. 322, which was a suit to enforce a lien, under the Massachusetts act of 1848, for materials furnished in building a vessel, Judge Sprague held that no lien existed, because the evidence and circumstances showed an intention on the part of the libellants to rely upon the personal credit of the builder. The charges in the books of the libellants were made to the builder personally, without any reference to, or mention of, any of the vessels which he was then building. The materials were taken from the libellants' yard by a teamster employed by the builder, and transferred to his ship-yard, and no exertions were made by the libellants to ascertain for what purpose these materials were to be used. When payments were made by the builder from time to time, there was no appropriation by the libellants on



We shall hereafter see that a person seeking to maintain a lien against a foreign vessel, by virtue of the maritime law, must show not only that the supplies were necessary, but that it was also necessary that the master should have a credit to obtain them. The liens given by the local law do not depend on the same requirements.<sup>1</sup>

The question has arisen how far the remedy *in rem*, given by statutes in many States, can be enforced by common-law courts. Under the act of 1789,<sup>2</sup> the district courts have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction . . . saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it." Assuming this act to be constitutional, it seems very clear that a suit *in rem* is not a common-law remedy, and that a State court has no power to proceed *in rem* in a case where an admiralty court has jurisdiction. This question has been before the Supreme Court of the United States in two recent cases, and it has been held, that the act of 1789 is constitutional, and that a State court has no jurisdiction *in rem* in a case over which the admiralty has jurisdiction *in rem*.<sup>3</sup>

These decisions have given rise to another question of some difficulty. For many years the admiralty courts exercised jurisdiction in cases of supplies furnished domestic vessels, where the laws of the States in which the supplies were furnished gave a lien. In 1859 the Supreme Court of the United States passed a rule limiting the remedy in admiralty in such cases to suits *in personam*. If the lien, in the case of a domestic vessel, could be en-

their books or receipts, to any items to distinguish their claim upon the different vessels.

<sup>1</sup> The *Young Sam*, U. S. C. C. Maine, *Curtis*, J., 20 Law Rep. 608, 610.

<sup>2</sup> C. 20, § 9, 1 U. S. Stats. at Large, 76.

<sup>3</sup> The *Moses Taylor*, 4 Wallace, 411; The *Hine v. Trevor*, id. 555. The first of these cases was for a breach of a contract of passenger carriage between New York and San Francisco. Suit *in rem* was brought in a State court in California, and carried by a writ of error to the Supreme Court of the United States. It was held that the case was within the admiralty jurisdiction, and that the State court had no authority to proceed *in rem*, the jurisdiction of the admiralty being exclusive, and the proceeding *in rem* not being a common-law remedy. The *Hine v. Trevor* was a case of collision between two steamboats at or near St. Louis, on the Mississippi River. Suit *in rem* was brought in a State court, and on a writ of error being brought, it was held that the State court had no jurisdiction.

forced by virtue of the act of 1789 alone, it would be clear that the State courts could not proceed *in rem*, even though the Supreme Court should decline to enforce such a remedy. The liens given by State laws have, however, been enforced, not as rights which the courts were bound to enforce, but as discretionary powers which the courts might lawfully exercise, where it did not involve controversies beyond the limits of admiralty jurisdiction.<sup>1</sup> In other words, these liens have been enforced in the same way that liens given by the statutes of other nations have been enforced. It would seem, therefore, that the State courts might exercise jurisdiction *in rem* in the case of domestic vessels, where this jurisdiction is given by State statutes.<sup>2</sup>

<sup>1</sup> See *The St. Lawrence*, 1 Black, 522, 530.

<sup>2</sup> The power of the State courts to enforce the lien *in rem* in the case of domestic vessels has been maintained in *Boylan v. Steamboat Victory*, 40 Misso. 244; *Morrison v. Steamboat Burns*, 41 Misso. 491; *The Steamship Circassian*, 50 Barb. 490; *Bird v. Steamboat Josephine*, 50 Barb. 501. The decision of the Supreme Court of New York has, however, been reversed by the court of appeals, as we are informed in 1 Bened. Adm. 156, note. The case of *Boylan v. Steamboat Victory* was carried to the Supreme Court of the United States on writ of error, but as the court held that it did not appear from the record that one of the questions mentioned in the twenty-fifth section of the Judiciary Act was raised in the State court, and actually decided by it, the writ of error was dismissed, and the point here presented was not decided. *The Victory*, 6 Wallace, 382.



## **B O O K I I.**

**ON THE LAW AND JURISDICTION OF ADMIRALTY.**



# A TREATISE

ON THE

## LAW OF SHIPPING AND ADMIRALTY.

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### CHAPTER I.

#### THE EXTENT OF THE JURISDICTION OF ADMIRALTY.

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##### SECTION I.

###### ADMIRALTY JURISDICTION AS DETERMINED BY PLACE.

THE jurisdiction of the court of admiralty in England is, undoubtedly, aside from the jurisdiction conferred by recent statutes, confined to places outside the body of a county, and within the ebb and flow of the tide; being permanent where the tide always flows, and existing in any place between high and low water mark when the tide covers that place, and ceasing to exist there when the tide leaves that place.<sup>1</sup> The admiralty powers of the courts of

<sup>1</sup> 1 Bl. Com. 110; 4 id. 268; Constable's Case, 5 Coke, 106, 107; Barber v. Wharton, 2 Ld. Raym. 1452; 2 East, P. C. 803. See also 1 Kent, Com. 366. But even if the *locus* be on the water and on a place where the tide never leaves the shore bare, admiralty is excluded of jurisdiction, if it be within the body of any county. This is by virtue of the statutes of 13 Rich. II. c. 5, and 15 Rich. II. c. 3, which were passed with a view of restraining the jurisdiction of the courts of admiralty. One of the reasons why these courts were obnoxious was, that they did not have a trial by jury, but followed the forms and were governed by the rules of the civil law, which was dreaded and detested by the English people; perhaps, because it was introduced by the clergy and used by them for their own aggrandizement. The civil law was especially fitted for the municipal form of government, but was antagonistic to the feudal system. See Pritchard's Digest, Preface; Wynne's Life of Sir L. Jenkins, p. 78; Thierry, Conquête de l'Angleterre, Vol. IV. pp. 334 - 339; Browne, Civ. & Adm. Law, Vol. II. p. 91.

this country are given by statutes in conformity with the Constitution; and must be defined and measured by those statutes which,

There has been great contention in regard to the construction of the statutes of Rich. II. Anciently the judges depended upon the fees of their courts for their emoluments, and the common-law courts, having the highest power, put such a construction on the statutes as very much abridged the rightful power of the admiralty; but the admiralty lawyers never acquiesced in this usurpation, and have recorded their protests against the deprivation of their authority. As the King's Bench have the controlling power, their decisions must be taken as the law of England, and they have held that the "bodies of counties" from which admiralty jurisdiction is excluded, comprehend all "navigable rivers, creeks, ports, harbors, and arms of the sea which are so narrow as to permit a person to discern, and attest upon oath, anything done on the other shore, and so as to enable an inquisition of the facts to be taken." *Rex v. Soleguard*, Andr. 231; 2 Browne, Civ. & Adm. Law, 92; *Stanton, J.*, Fitz. Herb. Abr. Corone, 399, 8 Edw. II.; 4 Inst. 140; *Hawkins*, P. C. p. 2, c. 9, § 14; 2 East, P. C. 804; *United States v. Wiltberger*, 5 Wheat. 106, note; Com. Dig. Tit. Adm. E. 7, 14; *Bacon*, Abr. Tit. Adm. A. See also *United States v. Grush*, 5 Mason, 290; and *United States v. Robinson*, 4 Mason, 307. Yet admiralty has always claimed jurisdiction on tide waters up to the first bridges, and rightfully too, according to the opinions of ten of the judges in 1713, cited in Andr. 232; 1 Kent, 366; *De Lovio v. Boit*, 2 Gallis. 398, 420; 15 Rich. II. c. 3. But prohibition lies if it be within a port, 4 Inst. 188, 141; *Violet v. Blague*, Cro. Jac. 514; 1 Com. Dig. 506. For a general discussion of this question in relation to prize, see *Ex parte Lynch*, 1 Madd. 15; and note to *The Amiable Nancy*, 3 Wheat. 546, 558. In 1812, all the judges agreed that common law and admiralty had concurrent jurisdiction in bays, havens, creeks, etc. where ships of war floated. 2 Leach's Crown Cases. 1093.

Much of this struggle arose in the time of Lord Coke. The insufficiency of his authorities and the reasons for his prohibitions have been amply shown by Godolphin, Exton, Jenkins, and others, and the whole learning now of any value is collected in the case of *De Lovio v. Boit*, 2 Gallis. 398. The practical value of this question is destroyed in England, by acts of parliament declaring the jurisdiction of the high courts of admiralty. The following books and cases generally accessible to American students contain elaborate discussions of the subject. *De Lovio v. Boit*, 2 Gallis. 398; 1 Kent Com. Lect. XVII.; *The Schooner Tilton*, 5 Mason, 465; *Bains v. Schooner James*, Bald. C. C. 544; *Ramsay v. Allegre*, 12 Wheat. 611; *The Huntress*, Davies, 93, note.

In *The Eleanor*, 6 Rob. Adm. 39, *The Public Opinion*, 2 Hagg. Adm. 398, and *The Eliza Jane*, 3 Hagg. Adm. 335, the court of admiralty refused jurisdiction, because the cause of action had arisen within the body of a county. But by 3 & 4 Vict. c. 65, § 6, it is enacted that the high court of admiralty shall have jurisdiction to decide all claims of salvage, damage, or towage, relating to any ship or sea-going vessel, and for necessities supplied, etc., whether such ship was within the body of a county or on the high seas at the time when the cause of action

in their turn, are in force if within the requirement and purview of the Constitution, and void if they exceed or violate the Constitution.<sup>1</sup> The first question, therefore, is, does the word admiralty mean, or necessarily imply in our constitution or in this country, what it undoubtedly meant in England, and therefore, as it may be fairly argued, in these States when they were colonies of Great Britain? It seems probable that no question of this kind, in regard to the jurisdiction of admiralty as affected by place, suggested itself to the framers of the Constitution; nor did any case come be-

accrued. And by 9 & 10 Vict. c. 99, § 40, said court has jurisdiction to decide all claims whatever, in the nature of salvage, to articles found at sea or on shore, and whether the services have been performed at sea or within the body of a county. By the 3 & 4 Vict. c. 65, questions of title and of mortgage, claims to proceeds in the registry, may be decided in said court, witnesses may be examined by word of mouth, and their attendance compelled.

In *The Alexander*, 1 W. Rob. 288, it is held that it was not necessary that the claim should have arisen since the passage of the statute in order to give the court jurisdiction.

In *The Fortitude*, 2 W. Rob. 217, it is held that the enabling power given to the court by the 3 & 4 Vict. c. 65, §§ 3, 4, does not extend to *all* questions arising out of a mortgage (as mortgagee's right to freight), but is confined to the ship itself being mortgaged. In the case of *A Raft of Timber*, 2 W. Rob. 251, under the 3 & 4 Vict. c. 65, § 6, the court refused to entertain a suit for salvage of a raft of timber, on the ground that it was neither a ship nor a sea-going vessel. But the 9 & 10 Vict. c. 99, § 40, above quoted, would now give the court jurisdiction. In *The Flecha*, 1 Spinks, Adm. 438, where a steam vessel which plied regularly between Ghent and London, was supplied with a new propeller, it was objected that as the vessel could have made her voyage in safety with her old propeller, the new one was not "a necessary" within the statutes, and consequently the court had no jurisdiction. But Dr. *Lushington* said: "I cannot accede to that proposition, for I think there is a necessity to make such vessels perfect and seaworthy in all respects. The opinion of the court will always be that these vessels, to which the lives of passengers are intrusted, should be constantly kept in that state of repair which most conduces to their safety."

<sup>1</sup> The Constitution of the United States, art. 3, § 2, provides that the judicial power shall extend "to all cases of admiralty and maritime jurisdiction." And the Judiciary Act of September 24, 1789, c. 20, § 9, provides that the district courts shall have "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it," etc. 1 U. S. Stats. at Large, 76.



fore the courts for some years; and when it did come, it appears to have been scarcely considered as an open question.

In 1825, the Supreme Court of the United States held that the admiralty jurisdiction was strictly confined to the "sea or waters within the ebb and flow of the tide;" and they consider, only to dismiss, the question whether Congress might not extend this jurisdiction to voyages on our western waters, under the "power to regulate commerce among the States."<sup>1</sup> In 1833, it was decided that the court had jurisdiction in a case where repairs were made at the port of New Orleans, the court taking judicial notice of the fact that the tide ebbed and flowed at that place, and considered it to ebb and flow although it was not strong enough to turn the current of the river backward, but merely to occasion a regular rise and fall of the water.<sup>2</sup> In 1837, the same court approved the law of the former cases, and it was held that the voyage must be substantially maritime, and did not come within this jurisdiction, because one terminus was at New Orleans within the

<sup>1</sup> *The Thomas Jefferson*, 10 Wheat. 428. This was a suit for wages earned on a voyage from Shippingport in Kentucky, up the river Missouri, and back to the port of departure. *Story, J.*, said: "In the great struggles between the courts of common law and the admiralty, the latter never attempted to assert any jurisdiction except over maritime contracts. In respect to contracts for the hire of seamen, the admiralty never pretended to claim, nor could it rightfully exercise any jurisdiction, except in cases where the service was substantially performed, or to be performed, upon the sea, or upon waters within the ebb and flow of the tide. This is the prescribed limit, which it was not at liberty to transcend. We say the service was to be substantially performed on the sea, or on tide water, because there is no doubt that the jurisdiction exists, although the commencement or termination of the voyage may happen to be at some place beyond the reach of the tide. The material consideration is, whether the service is essentially a maritime service. In the present case, the voyage, not only in its commencement and termination, but in all its intermediate progress, was several hundred of miles above the ebb and flow of the tide; and in no just sense can the wages be considered as earned in a maritime employment. Some reliance has been placed in argument upon that clause of the judiciary act of 1789, c. 20, § 9, which includes all seizures made on waters navigable from the sea by vessels of ten or more tons burden (of which description the waters in this case are), within the admiralty jurisdiction. But this is a statutable provision, and limited to the cases there stated. To make the argument available, it should be shown that some act of Congress had extended the right to sue in courts having admiralty jurisdiction, to cases of voyages of this nature."

<sup>2</sup> *Peyroux v. Howard*, 7 Pet. 324.

tide, the voyage being on the river Mississippi, between New Orleans and other ports hundreds of miles above the rise and fall of the tide.<sup>1</sup> In 1847, before the same court, this question was again raised, but not disposed of, because the collision, which was the foundation of the case, occurred on a place in the Mississippi where it was finally decided that the river rose and fell with the tide, and the important point was determined that the court had jurisdiction, although the collision occurred on a river within a county of the State of Louisiana.<sup>2</sup>

In February, 1845, an act of Congress was passed entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same." This act gives the district courts of the United States "the same jurisdiction in matters of contract and tort arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steam-

<sup>1</sup> *The Steamboat Orleans v. Phœbus*, 11 Pet. 175.

<sup>2</sup> *Waring v. Clarke*, 5 How. 441. *Woodbury, J., Daniel, J., and Grier, J.*, dissented. On page 464, Mr. Justice *Wayne*, in delivering the opinion of the court, said: "Before leaving this point, however, we desire to say that the ninth section of the Judiciary Act countenances all the conclusions which have been announced in this opinion. We look upon it as legislative action contemporary with the first-being of the Constitution, expressive of the opinion of some of its framers, that the grant of admiralty jurisdiction was to be interpreted by the courts in accordance with the acknowledged principles of general admiralty law. In that section the distinction is made between high seas and waters which are navigable from the sea by vessels of ten or more tons burden. Admiralty jurisdiction is given upon both, and, though the latter is confined by the language to cases of seizure, it is so with the understanding that such cases were strictly of themselves within the admiralty jurisdiction." In *Jackson v. Steamboat Magnolia*, 20 How. 296, in 1857, the decision in *Waring v. Clarke* was affirmed, Mr. Justice *Grier*, delivering the opinion of the court. *Carroll, J., Daniel, J., and Campbell, J.*, dissented. On p. 329, Mr. Justice *Campbell*, after citing the Judiciary Act, said: "It is difficult to comprehend on what principle the court can construe the grant of jurisdiction in this act over cases of seizure under the law of impost and trade upon navigable waters, to an extension of the civil jurisdiction of the admiralty to the same localities." *Waring v. Clarke* has also been affirmed in *Nelson v. Leland*, 22 How. 48; *Philadelphia R. v. Philadelphia Steam Towboat Co.* 23 How. 215; *The Commerce*, 1 Black, 574.

boats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States." It also provides that "in all suits brought in such courts in all such matters of contract or tort, the remedies, and the forms of process, and the modes of proceeding, shall be the same as are or may be used by such courts in cases of admiralty and maritime jurisdiction; and the maritime law of the United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits, in the same manner, and to the same extent, and with the same equities, as it now does in cases of admiralty and maritime jurisdiction; saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it; and saving also to the parties the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by the State laws, where such steamer or other vessel is employed in such business of commerce and navigation."<sup>1</sup>

In 1851,<sup>2</sup> a case was decided by the Supreme Court of the United States, in which the principal question was, whether this statute was constitutional, or unconstitutional and void. And the court decided that it was constitutional, not under the clause per-

<sup>1</sup> Act of 1845, c. 20, 5 U. S. Stats. at Large, 726.

<sup>2</sup> *The Genesee Chief v. Fitzhugh*, 12 How. 443. The suit was for a collision on Lake Ontario. The objection taken to the jurisdiction was that, under the construction given to the Constitution by the Supreme Court in the cases already cited, admiralty jurisdiction was confined to tide water. The court, therefore, were under the necessity of passing upon the correctness of their former decisions. Thus on p. 453, *Taney*, C. J. in delivering the opinion of the court said: "But if the admiralty jurisdiction is confined to tide water, the courts of the United States can exercise over the waters in question nothing more than ordinary jurisdiction in cases at common law and equity. . . . If this law, therefore, is constitutional, it must be supported on the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction as known and understood in the United States when the Constitution was adopted." On p. 457, after citing the 9th section of the Judiciary Act, the same learned Judge said: "The jurisdiction is here made to depend upon the navigable character of the water, and not upon the ebb and flow of the tide. If the water was navigable, it was deemed to be public; and if public was regarded as within the legitimate scope of the admiralty jurisdiction conferred by the Constitution."

mitting Congress to regulate commerce among the States, but on far wider grounds. It is indeed maintained by the court, in this case, that the limitation of tide waters has no force or applicability in this country; that it was reasonable and useful in England, where there is no important navigation above the flow of tide; but that originally and by its nature the admiralty jurisdiction extended over all public waters, or over all navigable waters which were used for the transport of commerce; that the English limitation answered very well for this country at its beginning, the old thirteen States having little or no navigation above the ebb and flow of the tide; but that circumstances were greatly changed; that we now border upon inland seas, and our magnificent western rivers are covered with an extensive and valuable commerce, and that the admiralty jurisdiction of this country, by force of the American meaning of the word, or that meaning which the peculiar circumstances of this country make necessary, extends over all our navigable waters, whether lake or river, and however far removed from the presence or influence of the tide. This question was ably and fully argued. The court were nearly unanimous in their opinion; and maintained it by a reasoning which is founded upon certain and pertinent facts, and which has in itself a force which we deem inevitable. We consider it, therefore, finally settled, both by the weight of the authority, and by the conclusiveness of the argument, that, by the law of this country, the admiralty jurisdiction extends over all navigable waters, without respect to the tide.<sup>1</sup>

<sup>1</sup> In cases of tort, the admiralty jurisdiction always depended, of course, upon locality, for there was nothing else to guide it. But the trials in the admiralty courts being without a jury, the English government, as has been said, were willing to prevent any usurpation of authority by the admiralty courts, and therefore the statutes of 13 and 15 Rich. II. were passed. The admiralty always contended that these statutes were only intended to prevent their meddling with things relating to the land, and were not intended to abridge their real jurisdiction, particularly as the 13 Rich. II. refers particularly to their jurisdiction in the time of King Edward III., and confirmed the same. See *De Lovio v. Boit*, 2 Gallis, 398, 420.

But it was the aim of Lord *Coke*, in those efforts of his to which we have already referred, to make locality the boundary in cases of contract; a thing which had not been attempted before his time. The unreasonableness and inconvenience of this rule compelled the common-law courts to relax it in cases of seaman's wages, and then they began to reflect upon what jurisdiction in admiralty rested; and

The correctness of this rule has been sustained in subsequent cases, and the rule itself has been applied in cases of a collision on the Mississippi river,<sup>1</sup> and in one on the Alabama river,<sup>2</sup> in all cases the torts being above tide waters. In the last case it was distinctly declared that the admiralty jurisdiction, exercised over the great navigable rivers of the West, was not by virtue of the act of 1845.<sup>3</sup> And in a later case, where a collision took place on the Yazoo river, two hundred miles from its mouth, where it falls into the Mississippi, the river being wholly within the State of Mississippi, and its waters being fresh, and there being no tides in it, it was held that the court had jurisdiction.<sup>4</sup>

all have since acknowledged that in cases of *contract*, the *subject-matter*, and not the locality, determined the jurisdiction. *Menetone v. Gibbons*, 3 T. R. 267, is the leading case upon this subject. See also *Waring v. Clarke*, 5 How. 441, 459; *The Commerce*, 1 Black, 574.

But the courts of this country have never paid much attention to the English interpretations of admiralty jurisdiction. The Colonies had each an admiralty court with powers equal to the largest claimed by the admiralty, even under Edward III. The States delegated to the federal government their separate "admiralty and maritime jurisdiction," using these words in their largest sense; which was the sense in which they are understood in every country in Europe, England excepted, and the sense in which they had been used here for a long time. And, without a word being said as to the very narrow jurisdiction of the English court in any of the debates or treatises contemporary with the formation of the Constitution, the decisions of the courts immediately after the formation of our present government, put a construction on the grants incompatible with the English rule. *Waring v. Clarke*, 5 How. 441; *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *The Huntress*, Daveis, 93, note. And now, by the decision in the case of *The Genesee Chief v. Fitzhugh*, 12 How. 443, the navigable lakes and rivers of the United States are considered similar in some respects to the sea. The arguments against this jurisdiction of the admiralty courts, have simply asserted that admiralty meant here just what it did in England at the time of our Revolution, and that the common law is our only guide in interpreting our Constitution. *Woodbury, J.*, in his dissenting opinion in *Waring v. Clarke*, 5 How. 441, and *Johnson, J.*, in *Ramsay v. Allegre*, 12 Wheat. 611, have stated the whole argument, with all the authority, in favor of the limited jurisdiction.

<sup>1</sup> *Fretz v. Bull*, 12 How. 466; *The Hine v. Trevor*, 4 Wallace, 555.

<sup>2</sup> *Jackson v. Steamboat Magnolia*, 20 How. 296. In *Williams v. The Barge Jenny Lind*, 1 Newb. Adm. 443, and in the case of *Eads v. The Steamboat H. D. Bacon*, 1 Newb. Adm. 274, claims for salvage compensation on the Mississippi were enforced; and in *McGinnis v. The Pontiac*, 1 Newb. Adm. 130, one for salvage on the Ohio was entertained.

<sup>3</sup> See also *The Hine v. Trevor*, 4 Wallace, 555.

<sup>4</sup> *Nelson v. Leland*, 22 How. 48.

There appears to be some misconception as to the effect of the decision of the Supreme Court upholding the constitutionality of the act of 1845. It is said that if the statute is constitutional on the ground "that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States when the Constitution was adopted, . . . it is a serious question whether the act of 1845 is not superseded and rendered nugatory by the decision of the Supreme Court."<sup>1</sup> The view is also sustained to some extent by Judge Willson in the United States District Court for the Northern District of Ohio,<sup>2</sup> that under the Constitution Congress has full power to grant admiralty jurisdiction over the lakes as well as over navigable rivers, and that the question is whether Congress, in framing the ninth section of the Judiciary Act, failed to carry out this great purpose of equality, and restricted the jurisdiction of the district courts to the high seas and to waters navigable from the high seas. He considers the clause granting "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction" as complete in itself, and that the subsequent clause, "on waters which are navigable from the sea by vessels of ten or more tons burden," relates merely to seizures, and

<sup>1</sup> This is the language of Judge *Conkling*, in his treatise on Admiralty Jurisdiction, Vol. 1, 2d ed. p. 17. And Judge *Wilkins*, in the district of Michigan, in enforcing a claim for wages on a voyage between Detroit and Buffalo, took occasion to say that "the jurisdiction of this court, in cases of admiralty, does not rest upon the statute of 1845, but upon the Constitution of the United States," etc. *Franconet v. The Propeller Backus*, 1 Newb. Adm. 1. This decision was given in 1852, but in 1856 the same judge stated the law more accurately. He said: "This court derives its jurisdiction from the Constitution of the United States, and the acts of Congress made in pursuance thereof. . . . The act of 1845 did not enlarge the jurisdiction of the national courts as to questions of admiralty, but merely conferred a new jurisdiction on the district court." *Scott v. The Young America*, 1 Newb. Adm. 101. In a case decided in the Northern District of Ohio in 1856, Judge *Willson* ruled that the decision in the case of *The Propeller Genesee Chief v. Fitzhugh*, "placed the admiralty jurisdiction of the lakes upon the same basis as that of the tide and salt waters." And that "independent of the act of 1845, the maritime law has the same application to cases on the lakes as it has to those upon tide water, not only in matters of jurisdiction, but also in forms of procedure and practice." *Parmlee v. The Propeller Charles Mears*, 1 Newb. Adm. 197. See also *Wolverton v. Lacey*, in the same court, 18 Law Rep. 672.

<sup>2</sup> *Fox v. Revenue Cutter*, No. 1, 8 Am. Law Reg. 459.

has nothing to do with the admiralty jurisdiction. He is accordingly of the opinion that while the courts have jurisdiction, under the act of 1845, in case of vessels exceeding twenty tons burden, enrolled and licensed, and engaged in navigation between different States, they have also jurisdiction under the act of 1789 over vessels under twenty tons burden, whether enrolled and licensed or not, and also of vessels employed in the foreign trade, although such vessels are on the lakes or navigable waters connecting the same.

This presents a question of much interest and importance. If the punctuation of the ninth section of the Judiciary Act, in the Statutes at Large, be correct, it would seem that the clause, "on waters which are navigable from the sea," was intended to apply to the words conferring admiralty jurisdiction as well as to the clause respecting seizures.<sup>1</sup> In Story's edition of the United States laws, and in some of the other earlier editions, the sentence reads: "where the seizures are made on waters which are navigable from the sea." In the Statutes at Large there is a comma between the words "made" and "on."

The language of the justices of the Supreme Court of the United States fully justifies the position that the act of 1789 only conferred jurisdiction over the sea and waters navigable from the sea.<sup>2</sup>

Under the act of 1845, it has been held that the court has not jurisdiction of a claim for wages for services rendered on a canal boat on the Erie canal, between New York and Buffalo, on the ground that the canal did not connect navigable lakes.<sup>3</sup> But the Welland canal, which connects Lake Erie with Lake Ontario, has been declared to be a navigable water within the meaning of the statute.<sup>4</sup> Under the statute of 1845, the district court has no jurisdiction over a contract of affreightment for the carriage of goods between two ports of the same State, though in a general ship

<sup>1</sup> See the act cited *ante*, p. 161, n. 1.

<sup>2</sup> Thus in *Jackson v. Steamboat Magnolia*, 20 How. 300, Mr. Justice Grier says: "Consequently, as Congress had never before 1845 conferred admiralty jurisdiction over the Northern fresh-water lakes not 'navigable from the sea,' the district courts could not assume it by virtue of this clause in the Constitution. An act of Congress was therefore necessary to confer this jurisdiction on those waters, and was completely within the constitutional powers of Congress." See also *The Hine v. Trevor*, 4 Wallace, 555.

<sup>3</sup> *McCormick v. Ives*, Abbott, Adm. 418.

<sup>4</sup> *Scott v. The Young America*, 1 Newb. Adm. 101.

whose principal voyage is between ports of different States.<sup>1</sup> Whether the court has jurisdiction, under the act of 1789, over a contract of affreightment between two ports of the same State, is perhaps still an open question.<sup>2</sup> It has been held that no suit can be brought for supplies furnished a vessel engaged exclusively in trade between two or more ports of the State where the supplies are furnished.<sup>3</sup> But this seems to be merely an affirmation of the doctrine of the Supreme Court, that in case of supplies furnished

<sup>1</sup> *Allen v. Newberry*, 21 How. 244. *Nelson, J.*, said: "She was a general ship, with an assorted cargo, engaged in a general carrying business between ports of different States; and there is some ground for saying, upon the words of the act of 1845, that the contracts over which the jurisdiction is conferred, are contracts of shipment with a vessel engaged in the business of commerce between the ports of different States. But the court is of opinion that this is not the true construction and import of the act. On the contrary, that the contracts mentioned relate to the goods carried as well as to the vessel, and that the shipment must be made between ports of different States." It was also suggested, though not decided, that in such a case, where the vessel had cargo on board to be carried between ports of the same State, as well as between ports of different States, in cases of sale or bottomry of the cargo for relief of the vessel in distress, of voluntary stranding of the ship, jettison, and the like, the court would deal incidentally with the subject. The precise meaning of the language used by the court is doubtful, and it is not very apparent whether they mean that in the cases mentioned, the court would exercise jurisdiction over the cargo shipped from one port to another in the same State, by itself, or whether they mean that, having jurisdiction over the cargo shipped to a different State, they would, in order to make a proper decree, take jurisdiction also over the other cargo.

<sup>2</sup> In *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 392, there is the following *dictum* of *Nelson, J.*: "Contracts growing out of the purely internal commerce of the State, as well as commerce beyond tide waters, are generally domestic in their origin and operation, and could scarcely have been intended to be drawn within the cognizance of the federal courts." And in *Maguire v. Card*, 21 How. 250, occurs the following *dictum* of the same learned judge in relation to the case of *Allen v. Newberry*: "That case occurred upon Lake Michigan, within waters upon which the jurisdiction of the court was regulated by the act of Congress of the 26th of February, 1845; but the restriction of the jurisdiction by that act was regarded by the court as but declaratory of the law, and that it existed independently of that statute." See also a *dictum* of *McLean, J.*, in *Nelson v. Leland*, 22 How. 48, 56. In the case of *The Sch. Emma Johnson*, 1 Sprague, 527, where the vessel was engaged as a packet between Boston and Chatham in Massachusetts, no question was made as to the jurisdiction. In the Circuit Court, however, the point was raised, and *Clifford, J.*, decided in favor of the jurisdiction.

<sup>3</sup> *Maguire v. Card*, 21 How. 248; *The Troy*, 4 Blatchf. C. C. 355.



a domestic vessel, there is no lien by the general maritime law. Whether the admiralty has jurisdiction over a case of salvage, where the vessel saved is engaged exclusively in the internal trade of a State, is a question which has been raised, but not decided.<sup>1</sup> In a case of tort it makes no difference whether the vessel be engaged in internal trade or not, as the jurisdiction in tort depends entirely upon the locality.<sup>2</sup> In 1853 the Supreme Court exercised jurisdiction over a passenger contract, the voyage being between Sacramento and San Francisco, both in California ;<sup>3</sup> and in a later case, a District Court has exercised jurisdiction in the case of a libel by mariners for their wages against a vessel plying on navigable waters, between Boston and Quincy, both places being in Massachusetts.<sup>4</sup>

While the jurisdiction of the district courts is limited, under the act of 1845, to vessels of twenty tons burden or upwards, the jurisdiction under the act of 1789 is not affected by the size of the vessel, the limitation being waters which are navigable from the sea by vessels of ten or more tons burden. To give the court jurisdiction, therefore, under the act of 1789, it is not necessary that it should appear that the vessel is of the burden of ten tons.<sup>5</sup>

Mixed cases often come before the admiralty courts, in which the services are rendered, or the claims arise, partly on land and partly at sea.<sup>6</sup> As if goods are on shore when embezzled, or sal-

<sup>1</sup> *Bondies v. Sherwood*, 22 How. 214, 217.

<sup>2</sup> *The Commerce*, 1 Black, 574.

<sup>3</sup> *Steamboat New World v. King*, 16 How. 469. The question of jurisdiction was not raised in this case by counsel, but it must have been considered, as *Daniel, J.*, dissented on the ground that the court had no jurisdiction.

<sup>4</sup> *The Sarah Jane*, U. S. D. C. Mass., *Lowell, J.*, 2 Am. Law Review, 455.

<sup>5</sup> *The Hine v. Trevor*, 4 Wallace, 570.

<sup>6</sup> In *United States v. Coombs*, 12 Pet. 72, 76, the court said, that "Mixed cases may arise, and often do arise, where the acts and services done are of a mixed nature; as where salvage services are performed partly on tide waters and partly on the shore, for the preservation of the property saved; in which the admiralty jurisdiction has been constantly exercised to the extent of decreeing salvage. That this is a rightful exercise of jurisdiction by our courts of admiralty, was assumed as the basis of much of the reasoning of this court in *American Ins. Co. v. Canter*, 1 Pet. 511. It has also been asserted and enforced by Lord *Stowell*, on various occasions; and especially in *The Augusta* or *Eugenie*, 1 Hagg. Adm. 16; *The Jonge Nicholaas*, 1 Hagg. Adm. 201; *The Rainger*, 2 Hagg. Adm. 42; *The Happy Return*, 2 Hagg. Adm. 198. See also *The Henry of*

vage services are continued after the cargo is landed ; and in such cases admiralty takes jurisdiction if the services or claims are principally or substantially maritime ; the word maritime, here, of course, now referring to the lakes and navigable waters connecting the same, as well as to the ocean and tide rivers. These mixed cases, however, are not cases of tort, but of contract.<sup>1</sup>

Liens, similar to those in admiralty, may be given by local law in reference to places or subjects or contracts not properly within admiralty jurisdiction. So far as these appertained to maritime matters, the courts of admiralty at one time enforced them, as in respect to repairing vessels at a home port,<sup>2</sup> and also in some cases enforced liens given by a State statute, which were not strictly

Philadelphia, 1 Hagg. Adm. 264 ; The Vesta, 2 Hagg. Adm. 189 ; The Salacia, 2 Hagg. Adm. 262." — We hold this doctrine to be law. But some of the authorities cited are very far from proving that Lord Stowell asserted and enforced the above doctrine. The *Augusta* or *Eugenie*, 1 Hagg. Adm. 16, which is the principal case relied upon, was entertained principally, if not solely, on the ground that the subject-matter was a perquisite of the crown. The £100 given to the suer was *not salvage*. The *Jonge Nicholas*, 1 Hagg. Adm. 201, simply decided what expenses of preserving the cargo were chargeable on that part of the cargo which was to be sold duty free, under the statute. The *Rainger*, 2 Hagg. Adm. 42, does not seem to confirm the doctrine. The others are simply salvage cases. The law as thus stated appears to have been held in courts of common law ; for it has been laid down, that if the libel is founded on one single continual act which was principally upon the sea, though a part was on the land, as if the mast of a ship be taken upon the sea, though it be afterwards brought ashore, no prohibition lies. Com. Dig. Adm. F. 5 ; 1 Rolle, Abr. 533, l. 13 ; which are but one citation. Mr. Justice Story also cites, in 12 Pet. 77, Com. Dig. Adm. E. 12 ; but not accurately. Nothing under E. gives any support to this view. The doctrine laid down may be better supported by the following authorities : " The court of admiralty has jurisdiction of a ship taken on the sea, being stranded or damaged in the haven." This evidently means salvage cases. Com. Dig. Adm. F. 6 ; *Turner v. Smith*, 1 Sid. 367 ; *Turner v. Neele*, 1 Lev. 243. And, " when admiralty has cognizance of the principal cause, it shall have jurisdiction over the incidents." *Radley v. Eggesfield*, 2 Saund. 260, 1 Vent. 173, 174, 2 Lev. 25 ; Anonymous, 1 Vent. 308 ; Anonymous, Cro. Eliz. 685 ; Com. Dig. Adm. F. 6 ; *Tremoulin v. Sands* (9 W. 3), Comb. 462, 463 ; 6 Viner's Abr. 516. In *Plummer v. Webb*, 4 Mason, 388, Story, J., said : " In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction, that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime."

<sup>1</sup> The *Plymouth*, 3 Wallace, 84.

<sup>2</sup> This question will be considered hereafter.

maritime in their nature.<sup>1</sup> It is now, however, well settled, that inasmuch as the State legislatures cannot confer jurisdiction upon the United States courts,<sup>2</sup> the court has only discretionary power, where the subject-matter of the lien is of a maritime nature;<sup>3</sup> and now, by the twelfth admiralty rule, the Supreme Court of the United States has limited the exercise of this power in the case of domestic vessels, to suits *in personam*.<sup>4</sup>

It has been held, that the admiralty has jurisdiction to enforce a lien given by a State statute for half pilotage fees, where the services of a pilot have been tendered and refused.<sup>5</sup> We cannot doubt that a district court would enforce, by admiralty process, a lien on a ship given by a foreign government or law, when that ship was in a port within the jurisdiction of the court.<sup>6</sup>

<sup>1</sup> The Ship Harriet, *Adm.* 229; The Ship Harvest, *id.* 271. In these cases ship-keepers of domestic vessels in port were held entitled to recover in admiralty, because a lien was given by a State statute, although it was admitted that the services were not strictly maritime.

<sup>2</sup> In *Steamboat Orleans v. Phœbus*, 11 Pet. 175, where the wages of the master on a voyage above tide water were sought to be recovered by a suit *in rem*, because the State law gave a lien, and the case of *Peyroux v. Howard*, 7 Pet. 343, was cited, *Story, J.*, said: "That decision does not authorize any such conclusion. In that case the repairs of the vessel for which the State laws created a lien were made at New Orleans, on tide waters. The contract was treated as a maritime contract, and the lien under the State laws was enforced in the admiralty, upon the ground that the court, under such circumstances, had jurisdiction of the contract as maritime; and then the lien, being attached to it, might be enforced according to the mode of administering remedies in the admiralty. The local laws can never confer jurisdiction on the courts of the United States. They can only furnish rules to ascertain the rights of parties, and thus assist in the administration of the proper remedies, where the jurisdiction is vested by the laws of the United States." See also *Maguire v. Card*, 21 How. 248; *Roach v. Chapman*, 22 How. 129; *The Steamer St. Lawrence*, 1 Black, 522.

<sup>3</sup> *The St. Lawrence*, 1 Black, 522. A wharfinger's lien given by a State statute cannot be enforced in admiralty. *Russel v. The Asa R. Swift*, 1 Newb. *Adm.* 533.

<sup>4</sup> 21 How. iv.

<sup>5</sup> *The Brig America*, U. S. D. C. Mass., 2 Am. Law Reg. 458.

<sup>6</sup> See the case of *The Barque Havana*, 1 Sprague, 402. In this case the court enforced the lien given to a master for his wages by the English statute of 17 & 18 Vict. c. 104. The vessel was owned in St. Johns, New Brunswick. The case was decided on the ground that the statute gave not only a remedy, but also a right, and that the lien should be enforced wherever the *thing* could be found. And in *Davis v. Leslie*, *Abbott, Adm.* 123, the provisions of an English statute

In cases of prize, however, the admiralty jurisdiction appears to depend wholly on the subject-matter, without a controlling reference to place; and captures by land, if by any co-operation with a naval force, are within the jurisdiction. In our note we shall endeavor to exhibit the present condition of the adjudication on this subject.<sup>1</sup>

In 1861<sup>2</sup> an act of Congress was passed, entitled "An act to confiscate property used for insurrectionary purposes." The first sec-

were enforced, which gives a lien in cases of shipwreck, provided the seamen use their utmost endeavors to save the vessel.

<sup>1</sup> It may now be considered settled law, that the courts of the United States, under the Judiciary Act of 1789, ch. 20, 1 U. S. Stats. at Large, 73, have, by the delegation of all civil causes of admiralty and maritime jurisdiction, at least as full jurisdiction of all causes of prize as the admiralty in England. The *Cargo of the Ship Emulous*, 1 Gallia. 563, 573. See also *Glass v. The Sloop Betsey*, 3 Dall. 6; 1 Kent, Com. 355, 356. The case of *Lindo v. Rodney*, 2 Doug. 613, note, fixed the jurisdiction of the High Court of Admiralty in England in cases of prize. It was there said, that, on the breaking out of a war, a special commission issues to the Lord High Admiral, to require the court of admiralty to take jurisdiction in prize causes. But see *Ex parte Lynch*, 1 Madd. 15, cited in 3 Wheat. 558, note. Questions of prize or no prize, or by whom taken, must be decided by the judge of the high court of admiralty, and cannot be tried at common law. *Mitchell v. Rodney* (in error), 2 Bro. P. C. 423. See also *Faith v. Pearson*, 2 Marsh. 133, 6 Taunt. 439, 4 Camp. 357, Holt, 113; *Pritchard's Dig. Prize*, 17-35. When a capture is made on land by the assistance of a fleet, all questions concerning the property captured belong exclusively to the jurisdiction of the high court of admiralty. *Lindo v. Rodney*, 2 Doug. 613, n.

All title to sea prize must be derived from commissions under the admiralty, which is the great fountain of maritime authority, and a military force on land is not invested with any commission so derived. A capture, therefore, at sea, made by such a force on land, enures to the benefit of the lord high admiral. *The Rebeckah*, 1 Rob. Adm. 227, 235.

All questions of prize are to be decided by the court of admiralty, and by no other. Therefore, in *Glass v. The Sloop Betsey*, 3 Dall. 6, it was held that the district court could take cognizance of a suit brought by the captured ship, against her captors, who were foreigners (French), and had sent their prize into Baltimore, to be adjudicated upon by the French consul. The court also held that the jurisdiction over French prizes heretofore held by French consuls in this country was not of right.

In *Six Hundred and Eighty Pieces Merchandise*, 2 Sprague, 233, goods were ferried across a river occupied by naval forces for the purposes of war, and were soon after seized on the wharf by a force sent from one of the vessels. Held, that there was jurisdiction in Admiralty. But see *Alexander's Cotton*, 2 Wallace, 404.

<sup>2</sup> Act of 1861, c. 60, 12 U. S. Stats. at Large, 319.

tion declared that "all such property is hereby declared to be lawful subject of prize and capture wherever found." The second section provided: "That such prizes and captures shall be condemned in the district or circuit court of the United States having jurisdiction of the amount, or in admiralty in any district in which the same may be seized, or into which they may be taken, and proceedings first instituted."

This act applies to seizures on land as well as on the sea; and where the seizure is on the land, the proceedings are to be generally in conformity to admiralty proceedings, but issues of fact must, on the demand of either party, be tried by a jury.<sup>1</sup>

## SECTION II.

### ADMIRALTY JURISDICTION AS DETERMINED BY THE SUBJECT-MATTER OF THE ACTION.

The history of this question, both in England and in this country, is very interesting. It is not easy to define with much precision the jurisdiction of these courts under the earlier Norman kings; but there is, perhaps, sufficient authority for saying, that, for some centuries before Richard II., it extended to all maritime contracts, and all offences on the high seas or tide waters.<sup>2</sup> But

<sup>1</sup> *Union Ins. Co. v. United States*, 6 Wallace, 759. *Chase*, C. J., in delivering the opinion of the court said: "The difficulty of construction arises from the terms in which jurisdiction is granted "to any district or circuit court having jurisdiction of the amount, or in admiralty in any district where the property is found." It is said that the use of the disjunctive "or" restricts the jurisdiction in admiralty to the District Courts; and this view is certainly not without warrant in the phraseology of the act. But when we look beyond the mere words to the obvious intent, we cannot help seeing that the word "or" must be taken conjunctively, and that the sense of the law is that both the circuit and the District Courts shall have jurisdiction "according to the amount" and "in admiralty. This construction impairs no rights of parties. In cases of seizures on land the right of trial by jury is not infringed. In such cases the proceeding must be in general conformity to the course in admiralty, but issues of fact, on the demand of either party, must be tried by jury. Where the seizure is made on navigable waters, the course of admiralty may be strictly observed."

<sup>2</sup> In *De Lovio v. Boit*, 2 Gallis. 398, 406, Mr. Justice *Story*, after a comprehensive review of all the authorities, states the following to be his conclusions: "At all events, it cannot be denied on these authorities, that before and in the reign

these courts had no juries; and were in this respect strongly opposed both to the popular will and the principles of English jurisprudence. The judges and officers of all the courts of England then depended for their support and emolument mainly on their fees and perquisites; and these again upon the extent of their business. They were, therefore, in some measure, rivals of each other. We have already considered this subject somewhat, in treating of admiralty jurisdiction, as determined by place. The conflict in relation to the questions of jurisdiction, as affected by the subject-matter in controversy, was still more urgent. And the endeavors of the common-law and equity courts to restrict the court of admiralty, or in other words, to exclude from that court and draw to themselves a portion of its business, were eminently successful. In its administration of justice, the admiralty court conformed in no respect to the common law, and did not acknowledge the authority of any of its rules. It governed itself wholly by maritime usages and customs, and by the ancient laws of the seas, and the forms and procedures of other maritime courts of Europe. All this opened it to attack, and after a considerable struggle, certain statutes were passed in the reign of Richard II., which were certainly intended to lessen the jurisdiction of admiralty very much, and which did lessen it, in fact, and by the construction of the common-law courts, far more, perhaps, than was intended. The admiralty courts did not consent to this construction; but, nevertheless, their jurisdiction was gradually abridged, until, at the adoption of our Constitution, it embraced, in fact, very much less than its original or early extent. The question then

of Edward III., the admiralty exercised jurisdiction, 1st, over matters of prize and its incidents; 2d, over torts, injuries, and offences, in ports within the ebb and flow of the tide, on the British seas and on the high seas; 3d, over contracts and other matters regulated and provided for by the laws of Oleron and other special ordinances, and 4th (as the commission of Robert de Herle shows), over maritime causes in general." This view of the admiralty jurisdiction in the reign of Edward III. is admitted to be correct. See 1 Kent, Com. 368. See also the opinion of *Johnson, J.*, dissenting, in *Ramsay v. Allegre*, 12 Wheat. 611. In fact, all the ancient learning is, as we have intimated, collected in *De Lovio v. Boit*, and, whatever may be the difference of opinion as to the general doctrine of this case, or as to the particular point which it decides, there is no dispute as to its general accuracy. The cases cited by Lord Coke to disprove this jurisdiction, are shown to "fail of their intended purpose, and leave the current of authority flowing with an uniform and irresistible force in its favor."

arose in this country what was meant by the words "admiralty" and "maritime jurisdiction?" Did they mean that jurisdiction as it originally existed in England; or as it existed when our Constitution was formed; or as it stood at any intermediate period? We are indebted for the true answer to the firmness and intelligence of the judges who administered the law of admiralty at the time these questions came up for adjudication, and we may be permitted to refer more specifically to Chief Justice Marshall and his associates, Mr. Justice Story and Mr. Justice Washington. After a conflict of some duration, we may consider it as settled, not, perhaps, that our admiralty jurisdiction is coequal with that of the original English, or that of the continental European admiralty, but is rather that defined by the statutes of Richard II. under the construction given to them by the contemporary, or immediately subsequent courts of admiralty. In general, and as a definition, there seems to be no other rule than that our admiralty jurisdiction embraces all maritime contracts, torts, injuries or offences.<sup>1</sup>

<sup>1</sup> The admiralty jurisdiction in this country, as to the subjects to which it attaches may fairly be said to have for its basis the jurisdiction of such courts in the time of Edward III.; and the decisions of our own courts on the subject have so fully expounded and discussed the maritime law, that we need not go beyond our own reports to find most of the law. Little attention has been paid to those decisions of the English common-law courts, which confined within limits unreasonably narrow the jurisdiction of the high court of admiralty. Not bound by precedents, except so far as they were consistent with reason, our courts took their powers from the Constitution and Congress, and the admiralty jurisdiction was restored to its original rightful and convenient limits, from which it had never been driven, except by the jealousy of the common-law lawyers, and which it has always kept in all other countries. The attempts of Lord Coke to apply the statutes of Rich. II. to contracts, and which, if successful and consistent in themselves, would have deprived the admiralty of cognizance even of seamen's wages, and bottomry bonds, were successful but a short time, and now, by acts of Parliament, much of the original jurisdiction has been restored. Of the many cases which might be cited on this point, perhaps *De Lovio v. Boit*, 2 Gallis. 398, and *Waring v. Clarke*, 5 How. 441, may be considered as the most instructive.

As to the restrictive statutes of Rich. II., we quote the following remarks from *De Lovio v. Boit*, 2 Gallis. 398, 420: "In the construction of these statutes, the admiralty has uniformly and without hesitation maintained, that they were never intended to abridge or restrain the rightful jurisdiction of that court; that they were meant to take away any pretence of entertaining suits upon contracts arising wholly upon land, and referring solely to terrene affairs, and upon torts or injuries which, though arising in ports, were not done within the ebb and flow of

But the question still remains, what contracts or what torts are maritime? We may say that within this term are certainly included salvage;<sup>1</sup> bonds of bottomry, respondentia or hypothecation of ship and cargo;<sup>2</sup> seizures under the laws of impost, navi-

the tide; and that the language of those statutes, as well as the manifest object thereof, as stated in the preambles and in the petitions on which they were founded, is fully satisfied by this exposition. So that, consistently with these statutes, the admiralty may still exercise jurisdiction, 1, over torts and injuries upon the high seas, and in ports within the ebb and flow of the tide, and in great streams below the first bridges; 2, over all maritime contracts, arising at home or abroad; 3, over matters of prize and its incidents. On the other hand, the courts of common law have held that the jurisdiction of the admiralty is confined to contracts and things *exclusively* made and done upon the high seas, and to be executed upon the high seas; that it has no jurisdiction over torts, offences, or injuries done in port, within the bodies of counties, notwithstanding the places be within the ebb and flow of the tide; nor over maritime contracts made within the bodies of counties or beyond sea, although they are in some measure to be executed upon the high seas; nor of contracts made upon the high seas to be executed upon land, or touching things not in their own nature maritime, such as a contract for payment of money; nor of any contracts, which, though maritime and made at sea, are under seal and contain unusual stipulations." It is plain that all the above interpretation is not now, nor has for a long time, been accepted. The attempt to transfer the test of locality to contracts was met in *Menetone v. Gibbons*, 3 T. R. 267, 269, where it is expressly laid down that, in cases of contracts, the subject-matter governs the admiralty jurisdiction. See *Waring v. Clarke*, 5 How. 441, 459; and *ante*, p. 165, n. 1. Among the most important cases in which the admiralty jurisdiction of this country has been considered, besides those already cited in this note, are *The Huntress*, *Daveis*, 93; *Peele v. Merchants' Ins. Co.* 3 Mason, 28; *Read v. The Hull of a New Brig*, 1 Story, 244; *Hale v. Washington Ins. Co.* 2 Story, 176; *Ramsay v. Allegre*, 12 Wheat. 611; *United States v. Sch. Sally*, 2 Cranch, 406; *United States v. Sch. Betsey & Charlotte*, 4 Cranch, 443; *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344; *United States v. La Vengeance*, 3 Dall. 297; *Minturn v. Maynard*, 17 How. 477; *Bogart v. Steamboat John Jay*, 17 How. 399; *Ward v. Peck*, 18 How. 267; *Schuchardt v. Ship Angelique*, 19 How. 239; *Vandewater v. Mills*, 19 How. 82; *Taylor v. Carryl*, 20 How. 583; *Jackson v. Steamboat Magnolia*, 20 How. 296.

<sup>1</sup> *United States v. Coombs*, 12 Pet. 72; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511. The admiralty jurisdiction is asserted in salvage questions between foreigners, in *Mason v. The Blaireau*, 2 Cranch, 240. See *ante*, p. 166, note 2.

<sup>2</sup> *The Aurora*, 1 Wheat. 96; *Blaine v. Ship Charles Carter*, 4 Cranch, 328; *The Virgin*, 8 Pet. 538; *The Fortitude*, 3 Sumner, 228; *The Brig Ann C. Pratt*, 1 Curtis, C. C. 340, affirmed, *Carrington v. Pratt*, 18 How. 63. See also *Menetone v. Gibbons*, 3 T. R. 257; and *ante*, Vol. I., p. 133, n. 4.



gation, or trade;<sup>1</sup> and cases or questions of prize or ransom.<sup>2</sup> Nor should we hesitate to place, with almost equal certainty, with these, demurrage,<sup>3</sup> all charter-parties<sup>4</sup> and contracts of affreightments,<sup>5</sup> on voyages made between different States. How far there

<sup>1</sup> Act of 1789, c. 20, § 9, 1 U. S. Stats. at Large, 76. See *post*, c. 4.

<sup>2</sup> *Glass v. Sloop Betsey*, 3 Dall. 6. In this case the commander of a French privateer captured a vessel on the high seas and sent her into Baltimore to be adjudicated upon by the French consul, as was to some extent the practice. The owners of the vessel and cargo filed a libel in the District Court of the United States, claiming restitution on the ground that the vessel belonged to subjects of the king of Sweden, and that the cargo was owned jointly by Americans and Swedes. A plea to the jurisdiction was filed, but it was overruled, and the court was also of the opinion that no foreign power could of right "institute or erect any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by and be in pursuance of treaties."

<sup>3</sup> *Higgins v. United States Steamship Co.* 3 Blatchf. C. C. 282. This was a suit *in personam*.

<sup>4</sup> *The Sch. Volunteer*, 1 Sumner, 551; *Certain Logs of Mahogany*, 2 id. 589; *Arthur v. Sch. Cassius*, 2 Story, 81; *Drinkwater v. Brig Spartan*, Ware, 149; *Morewood v. Enequist*, 23 How. 491, where the question was fully discussed by counsel. It has been held, however, that an action *in rem* will not lie for the misrepresentation or concealment of facts by her master or owner in respect to the tonnage or capacity of a vessel. *The Eli Whitney*, 1 Blatchf. C. C. 360.

<sup>5</sup> *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344; *Rich v. Lambert*, 12 id. 347; *The Sch. Reeside*, 2 Sumner, 567; *The Rebecca*, Ware, 188; *The Phebe*, id. 263; *The Paragon*, id. 322. In *New Jersey Steam Nav. Co. v. Merchants' Bank*, *supra*, a libel *in personam* for breach of a contract of affreightment between the cities of Providence and New York, was maintained. On page 392, the court disposed of the objection that the suit was *in personam*, as follows: "If the cause is a maritime cause, subject to admiralty cognizance, jurisdiction is complete over the person as well as over the ship; it must in its nature, be complete, for it cannot be confined to one of the remedies on the contract, when the contract itself is within its cognizance." See *Swaim v. The Franklin*, Crabbe, 210.

In *Church v. Shelton*, 2 Curtis, C. C. 271, the libel alleged that certain boxes of sugar were shipped by the libellant at Havana, to be carried to Boston and delivered to the libellant for an agreed freight; that bills of lading were signed, etc.; that the vessel got ashore near Key West and was relieved by wreckers and went into that port in distress; that the amount of salvage was referred by the master to arbitrators, and the libellant upon information of what was thus due paid the sum of six thousand two hundred dollars as his proportion of the salvage compensation; that he afterwards discovered that the vessel was fraudulently wrecked by the master in concert with the wreckers, and that the respondents were also ignorant of the fact until after the money was paid; and that they afterwards recovered the money by a suit in the admiralty court at Key West.

is jurisdiction over the domestic commerce of a State, that is, over contracts for carrying goods between ports and places in the same State, is, perhaps, still an open question.<sup>1</sup> There is a general admiralty jurisdiction over a contract for the conveyance of a passenger in a vessel.<sup>2</sup> There is also jurisdiction over contracts with material men ;<sup>3</sup> jettisons and maritime contributions and aver-

It was contended by the respondents that the suit was merely to recover back money which they had received at Key West by reason of the suit there, and was but another form of an action for money had and received, over which the admiralty had no jurisdiction. But the court held that the action was brought for the breach of a contract of affreightment, and that as the court had jurisdiction over the entire contract, it could proceed to inquire into all its breaches, and all the damages suffered thereby, however peculiar they might be, and whatever issues they might involve.

<sup>1</sup> See *ante*, p. 169.

<sup>2</sup> *Steamboat New World v. King*, 16 How. 469. The appellee in this case was a passenger on a voyage from Sacramento to San Francisco, and this suit was brought for injuries sustained by the negligence of those in charge of the vessel. The question of jurisdiction was argued, but it appears to have been assumed to exist by the majority of the court, as nothing is said in regard to it. Mr. Justice Daniel dissented, however, on the express ground that the court had no jurisdiction. In New York, the general doctrine has been laid down in several cases that "ships engaged in carrying passengers on the high seas for hire, stand on the same footing of responsibility, according to the maritime law, as those engaged in carrying merchandise, the passage-money being equivalent to the freight ; that, therefore, on a breach of a passenger contract and damage resulting, the ship as well as the owner is bound to respond." *The Pacific*, 1 Blatchf. C. C. 569 ; *The Aberfoyle*, id. 360 ; *The Zenobia*, Abbott, Adm. 48. See also *Walsh v. The Steamboat M. H. Wright*, 1 Newb. Adm. 494 ; *Pearson v. Duane*, 4 Wallace, 605.

<sup>3</sup> *The General Smith*, 4 Wheat. 438. This is now limited by the twelfth admiralty rule. See *post*, c. 9. In *Ransom v. Mayo*, 3 Blatchf. C. C. 70, the court decided that an action would not lie against the owner of a ship-yard for damages occasioned by the vessel being injured while being hauled up on the ways for repairs. The libel was founded on the implied duty on the part of the ship-builder to perform the service with skill and care, and alleged that the damage resulted from negligence and want of proper skill in conducting the business. The suit was dismissed for want of jurisdiction, on the ground that the duty did not arise out of a maritime contract, it being made on land and relating to service to be performed on land. But in the case of *Wortman v. Griffith*, 3 Blatchf. C. C. 528, where the owner of a ship-yard was allowed to recover for the service of hauling a vessel on the ways, and for the use of the ways while another person was repairing the vessel, the same judge said : "I do not go into the question whether this is a contract made, or service rendered, on the land or on the water ; it undoubtedly partakes of both ; for I am free to confess, I have not much respect for this and other like distinctions that have sometimes been resorted to for the

ages;<sup>1</sup> pilotage;<sup>2</sup> surveys of ship and cargo;<sup>3</sup> and generally all assaults and batteries, damages and trespasses<sup>4</sup> occurring on the high seas and navigable waters. Whether in relation to this last subject, the decision in *The Genesee Chief v. Fitzhugh*,<sup>5</sup> will apply in its full extent, so as to include, for instance, any injuries from a quarrel between two persons accidentally on board a boat on any of our navigable streams may certainly be doubted. It is said that torts committed on tide waters within foreign ports are perhaps

purpose of ascertaining when the admiralty has and has not jurisdiction. The nature and character of the contract, and of the service, have always appeared to me to be sounder guides for determining the question." An action *in rem* will not lie against a vessel to recover damages for the refusal of the master to accept supplies which he had agreed to take. *The Cabarga*, 3 Blatchf. C. C. 751.

<sup>1</sup> General average seems clearly to be a subject of admiralty jurisdiction, but some doubt has been thrown upon the question by the decision of the supreme court in *Cutler v. Rae*, 7 How. 729. It was here held that an action *in personam* by the owner of the vessel against the owner of the cargo would not lie after the cargo had been delivered up. It has however been held that a libel *in rem* is maintainable against the vessel, by a shipper entitled to contribution from the ship. *Dupont de Nemours v. Vance*, 19 How. 162; *Dike v. Propeller St. Joseph*, 6 McLean, C. C. 573; *The John Perkins*, U. S. C. C., Mass. 1857, 21 Law Rep. 87, 96. See these cases commented on *ante*, Vol. I. p. 477, 478.

<sup>2</sup> *Hobart v. Drogan*, 10 Pet. 108; *The Anne*, 1 Mason, 408; and cases *ante*, p. 106, note 4. In *The Brig America*, U. S. D. C. Mass., 2 Am. Law Review, 458, a lien given by a State statute for half pilotage fees was enforced in admiralty. But see *Leitch v. Steamer George Law*, U. S. D. C. New York, 6 Am. Law Reg. 368.

<sup>3</sup> This was the opinion of Mr. Justice Story, in his Commentaries on the Constitution, Vol. III. p. 532, § 1665, citing *Janney v. Columbian Ins. Co.* 10 Wheat. 411. The only authority for this position in the case cited, is the *dictum* of Mr. Justice Johnson, which is as follows: "In other parts of the world, it is very generally exercised as an incident to the admiralty power; and the admiralty jurisdiction under our system, can only be exercised under the laws of the United States." See also the language of Mr. Justice Story, in the case of *The Sch. Tilton*, 5 Mason, 465, 474. We have no doubt that on principle our admiralty courts should have jurisdiction to order a survey, and decree a sale of a damaged ship on a petition by the master, but we are not aware of any decision where it is so held, and such a procedure is not usual in practice.

<sup>4</sup> As collision, *The Propeller Commerce*, 1 Black, 574. In the *Steamer New Philadelphia*, 1 Black, 62, a suit *in rem* was brought by the owners of a barge against a steamer, which had the barge in tow, for damages caused by a collision between the barge and another vessel, which was owing to the unskilful management of the steamer. No objection was made to the jurisdiction.

<sup>5</sup> *The Genesee Chief v. Fitzhugh*, 12 How. 443.

under admiralty jurisdiction.<sup>1</sup> But would it now be said that this artificial boundary of tide waters is to be overleaped for this purpose also; and that torts in a navigable stream in Asia or Africa, for instance, far above tide waters, are now within admiralty jurisdiction? An examination of the case of *The Genesee Chief* leads irresistibly to the conclusion that the decision was grounded upon what seemed to be a necessity. Our lakes and rivers carried our ships between our own States, and in some instances between them and foreign countries, and the remedies and resources of admiralty were as much demanded by that inland commerce as by our foreign commerce. If any such necessity or reason exists, as to the punishment of crime committed in a river of China or Africa, it must be because no other tribunal to which our country would be willing to confide the case would be likely to take cognizance of it.<sup>2</sup>

Policies of insurance have been asserted and reasserted to be "maritime contracts" within the admiralty meaning of the word, and therefore within the admiralty jurisdiction. We cannot, however, but regard this matter as still open to much question; and should expect that many of our courts of admiralty would refuse to receive a libel upon a common policy of insurance and try the case in admiralty. Our reason is simply this: the contract of insurance is made between parties one of whom certainly is in no other sense a "maritime" person than all must be who have any connection, direct or remote, close or slight, with the sea. And the contract itself, although it relates to a ship, or a cargo and a voyage, is a land contract, and not a sea contract, unless every contract is necessarily maritime which relates to property that is water-borne, and we do not believe that the word has, in law, a meaning so extensive.<sup>3</sup>

<sup>1</sup> *Thomas v. Lane*, 2 Sumner, 1.

<sup>2</sup> In *The Ida, Lush*. Adm. 6, the master of a Danish schooner which lay between an English bark and the wharf, at the port of Ibraila in the Danube, in order to get his schooner out went on board the bark and wilfully cut her adrift, and caused her thereby to swing into the stream and strike and capsize a lighter on which was part of the bark's cargo belonging to Turkish owners. The Turkish owners brought a suit *in rem* in the English admiralty court against the Danish schooner, but Dr. *Lushington* refused to take jurisdiction.

<sup>3</sup> In the leading case of *De Lovio v. Boit*, 2 Gallis. 398, Mr. Justice *Story*, in a most elaborate and exhaustive decision, held that a policy of insurance is a maritime con-

Seamen may sue in admiralty, and so may the pilot, engineers, firemen, and deck-hands on board a steamboat,<sup>1</sup> and so may all persons serving in a way, either essentially or materially, and directly useful to the navigation of any vessel; as the mate and engineer of an enrolled steamer, employed in towing vessels in and about the harbor of Boston,<sup>2</sup> pursers,<sup>3</sup> stewards,<sup>4</sup> cooks,<sup>5</sup> ship-carpenters,<sup>6</sup> coopers on whaling voyages,<sup>7</sup> and indeed, all officers of a vessel, except the master.<sup>8</sup> Whether a surgeon or physician

tract, and within the admiralty jurisdiction of the United States courts. This case was decided in 1815, and in 1822 the jurisdiction was affirmed in *Peele v. Merchants' Ins. Co.* 3 Mason, 27, and again in 1842, in the case of *Hale v. Washington Ins. Co.* 2 Story, 176. In 1855, the same question came before Mr. Justice Curtis, in the case of *Gloucester Ins. Co. v. Younger*, 2 Curtis, C. C. 322, and the jurisdiction was again affirmed, but solely on the ground that it was not an open question in the first circuit, the learned judge expressly declining to express his own opinion upon the question. After speaking of the case of *Cutler v. Rae*, 7 How. 729, he said: "Still, an inquiry into the extent of the admiralty jurisdiction, under the Constitution of the United States, is, to some extent, at least, an historical question; and whether a particular class of contracts is within that jurisdiction, is to be determined, not by reasoning *à priori*, but by examining into the actual extent of that jurisdiction, as exercised in this country prior to the formation of the Constitution. This may lead, as comparing the cases of *New Jersey S. N. Co. v. Merchants' Bank*, and *Cutler v. Rae*, and *The Genesee Chief*, it may, perhaps, be said, it has led, to theoretical anomalies, which can scarcely be reconciled, but which may, nevertheless, be sound deductions from correct premises." See *s. c. nom. Younger v. Gloucester Ins. Co.* 1 Sprague, 236. *Pattison v. Mills*, 1 Dow & Cl. 342, *s. c. nom. Albion Ins. Co. v. Mills*, 3 Wilson & S. 218, is an action in a Scotch admiralty court on a contract for insurance.

<sup>1</sup> *Wilson v. The Ohio*, Gilpin, 505.

<sup>2</sup> *The Steamer May Queen*, 1 Sprague, 588.

<sup>3</sup> *Alleson v. Marsh*, 2 Vent. 181; *The Prince George*, 3 Hagg. Adm. 376.

<sup>4</sup> *Black v. Ship Louisiana*, 2 Pet. Adm. 268; *Smith v. Sloop Pekin*, Gilpin, 203.

<sup>5</sup> *Turner's Case*, Ware, 83. See *Allen v. Hallet*, Abbott, Adm. 573.

<sup>6</sup> *Wheeler v. Thompson*, 2 Stra. 707; *Creed v. Mallet*, Fortes. 231. In *Sheridan v. Furbur*, Blatchf. & H. Adm. 423, Judge *Betts* held that a ship carpenter ranked as an ordinary seaman, and was bound to perform the duties of one, when so commanded by an officer. See also *Dana's Seaman's Friend*, 154.

<sup>7</sup> *Macomber v. Thompson*, 1 Sumner, 384. No question as to the jurisdiction was made.

<sup>8</sup> As the mate. *Bayley v. Grant*, 1 Salk. 33, Holt, 48, *nom. Bailly v. Grant*, 1 Ld. Raym. 632; *Hook v. Moreton*, 1 Ld. Raym. 397. See also *ante*, p. 44, n. 3. And the boatswain. *Alleson v. Marsh*, 2 Vent. 181; *Ragg v. King*, 2 Stra. 858.

may sue in admiralty for his wages, is not, perhaps, entirely settled by authority. On principle, we should say he had this right.<sup>1</sup> So a woman, if she performs a seaman's work, may sue as seaman.<sup>2</sup> So may persons hired principally for their skill as wreckers, who are also required to aid in the management of the vessel.<sup>3</sup> Mere lands-

<sup>1</sup> The question was raised but not decided in *Maddox v. —*, 12 Mod. 526, decided in 1700. In 1754, the question came again before the King's Bench, on a motion for a prohibition, and the court were of the opinion that a surgeon was a mariner, and might sue in the admiralty. *Mills v. Long, Sayer*, 136. See also *The Wharton*, 3 Hagg. Adm. 148, note, decided in 1761, where it incidentally appears that the vessel was arrested and sold for wages due to the surgeon. In *The Lord Hobart*, 2 Dods. 100, 104, decided in 1815, Sir *William Scott* expressed a very strong doubt whether an action would lie in such a case, though the point was not decided. He also said it was certain that he could not sue in the admiralty for medicines furnished to the crew. The case of *Mills v. Long* was evidently not brought to the notice of the court. In *Gardner v. The New Jersey*, 1 Pet. Adm. 223, 232, the claim of a physician was refused, even out of the remnants and surplus in the hands of the court. But there are *dicta* in favor of the right, by Judge *Hopkinson*, in *Trainer v. The Superior*, Gilpin, 514, 516; *Thackarey v. The Farmer*, Gilpin, 524, 531, 534, and no objection was taken to the jurisdiction in *Shaw v. The Lethe*, Bee, 424. In this conflict of opinion, it may be well to examine the reasons upon which the decisions and *dicta* rest. *Mills v. Long* was decided on the ground that the surgeon was under the command of the master, and as much obliged, if called upon by the master, to assist in navigating the ship as the carpenter. Sir *William Scott's* doubt rests on the assumption that the surgeon is not obliged to render such services, and we suppose, at the present day, that the surgeon takes no part in the navigation of the vessel. Judge *Peters* gives no reason for his opinion, but states it as a matter about which there is no doubt. We think, however, that the true reason for sustaining the jurisdiction in such a case is stated by Judge *Hopkinson*, in the cases above referred to, to be the nature of the service which the surgeon renders in attending to the health of the crew and ministering to the sick, as a carpenter is required for the preservation and repair of the ship in case of accident, and the cook and steward to feed the crew. And in *Ross v. Walker*, 2 Wilson, 264, decided in 1765, there is a *dictum* that a surgeon may sue in admiralty, because he preserves those who preserve the ship.

<sup>2</sup> See *The Jane & Matilda*, 1 Hagg. Adm. 187; *Wolverton v. Lacey*, U. S. D. C. Ohio, 18 Law Rep. 672; *Sage-man v. Sch. Brandywine*, 1 Newb. Adm. 5. Lord *Stowell*, in the case first cited, entertained the suit with much reluctance, on the ground of the tendency to immorality which the presence of a female on board in that capacity would create. But his objections would apply more strongly to the hiring of a female, than to her claim for wages after she had performed her duty.

<sup>3</sup> The *Sch. Highlander*, 1 Sprague, 510.

men on board the vessel have no lien, because the service they perform is not maritime; <sup>1</sup> as, for example, barbers.<sup>2</sup>

So musicians, hired as such, and employed only as such, have no lien,<sup>3</sup> nor had persons employed on board a vessel which was used to carry wood to Philadelphia from a point on the Delaware bank of the river, nearly opposite the city.<sup>4</sup> But a libel will be sustained for seamen's service on board vessels which go between ports of adjoining States, or from port to port even in the same State;<sup>5</sup> but not, it has been said, on board ferry-boats, or tugs or lighters employed in ordinary traffic along our shores.<sup>6</sup> It is now

<sup>1</sup> Packard v. The Louisa, 2 Woodb. & M. 48.

<sup>2</sup> In Thackarey v. The Farmer, Gilpin, 524, 534, *Hopkinson, J.*, said: "If the master should take with him a servant, whose sole business should be to shave him or comb his hair; or another to amuse him with a violin, the service would be performed on the high sea, but would it be a maritime contract or service, for which the ship could be libelled and attached in the admiralty, or her owners be personally responsible by any process?"

<sup>3</sup> Trainer v. The Superior, Gilpin, 514. The libellants in this case were employed as musicians on board a museum boat which went from State to State.

<sup>4</sup> Thackarey v. The Farmer, Gilpin, 524.

<sup>5</sup> Smith v. The Sloop Pekin, Gilpin, 203. In the case of The Coal Boat D. C. Salisbury, Olcott, Adm. 71, the boat was of forty-four tons burden, enrolled and licensed as a coaster, and was employed in transporting coal from Philadelphia to New York by the way of the Delaware river and the Raritan canal and river. She was towed by steamboats to, through, and from the canal, and the men on board performed no other service in her navigation on tide waters than aiding in steering her at particular times of tide, and occasionally at particular points on the passage. It was held that as the service was principally on tide waters, the court had jurisdiction of the case, and would enforce a lien for wages. See next note.

<sup>6</sup> In Thackarey v. The Farmer, Gilpin, 524, the general question as to the rights of seamen in certain small craft, was fully considered. The court held that a contract for the payment of labor on board of a vessel employed in carrying fuel to the city of Philadelphia from the opposite shore of the Delaware river, could not be enforced by a suit *in rem* in the admiralty. It was strongly contended that this fell within the definition laid down in *The Thomas Jefferson*, 10 Wheat. 428. And so it would seem. But the judge held, 1st, that the strong and pointed language of the definition which laid down tide waters as the guide to the jurisdiction, must be considered with reference to the case itself, that point being especially under consideration; and 2d, that a great abuse had been going on of this definition, so that every cockleshell considered itself a ship, and every farmer who brought produce to the market at Philadelphia thought himself a navigator of the vasty deep. He therefore said that ferry-boats, and such as are engaged in ordinary traffic along our shores, are not within admiralty jurisdiction. The

provided by statute that a canal boat without masts or steam power, *now* required by law to be registered, licensed, or enrolled and licensed, is not subject to be libelled in any of the United States courts, for the wages of any person or persons who may be employed on board thereof, or in navigating the same.<sup>1</sup> And it has been doubted whether a canal-boat, exclusively adapted to canal navigation, and having, of itself, no power of navigation, is subject to a maritime lien for the breach of a contract of affreightment.<sup>2</sup> A libel will be sustained for service as seamen in fitting out a vessel which does not go to sea, the voyage being given up by the owners.<sup>3</sup> If a seaman, after the voyage is finished, re-

decision has been acquiesced in, and is cited with approval, by *Kent* in Vol. I. p. 379, n. See also *Boon v. The Hornet*, *Crabbe*, 426.

In *Packard v. The Louisa*, 2 Woodb. & M. 48, 53, where the libellant was engaged in a small vessel which carried stone from Quincy to Boston, and helped lay the stone as well as to navigate the vessel, though the claim of the seaman was really denied on the ground of too long delay, yet from what the court said, the nature of the employment was probably considered enough to take it out of admiralty. "It is doubtful, therefore, whether Packard's employment on board of *The Louisa*, partly in loading and laying stone, or the business of the sloop herself, could be regarded strictly as maritime and commercial. It seemed to be not wholly that of the sailor, whose services in and for the ship, and whose reckless character in ocean dangers, have made the law indulge him with this additional security." But in the case of *The Sloop Canton*, 1 Sprague, 437, where the vessel was engaged in a similar employment, Judge *Sprague* held the vessel liable for the wages, on the ground that the persons engaged on board must have been possessed of some skill in navigation. "They must," said the learned judge, "have steered, furled, and reefed the sails, and brought the vessel to anchor. They must have been able to hand, reef, and steer, a common criterion of ordinary seamanship. They ought also to have known the rules of navigation in regard to collisions, and had they negligently run afoul of another vessel, the owners of this sloop would have been held responsible for the damage. I cannot hold that the duties which these libellants performed were merely those of landmen." It was shown that the stones when taken out of the vessel were laid by the crew, in order so as to make a wharf. It was held that this was but a way of unloading the vessel, and was but subsidiary to the principal business. Similar decisions were made in *The Sch. Mary*, 1 Sprague, 204; and in *The Sarah Jane*, U. S. D. C. Mass., *Lowell, J.*, 2 Am. Law Review, 455. See also *post*, p. 186, n. 3.

<sup>1</sup> Act of 1846, c. 60, 9 U. S. Stat. at Large, 38. The word *now* is probably a misprint for *not*.

<sup>2</sup> *The Ann Arbor*, 4 Blatchf. C. C. 205.

<sup>3</sup> *Wells v. Osman*, 2 Ld. Raym. 1044, 6 Mod. 238.



mains on board, as watchman or keeper, or in any such capacity, he cannot sue in admiralty for the wages of this service, as seaman.<sup>1</sup> But if the voyage is not ended, but only temporarily delayed, and the seaman not discharged, it is a continuing service in the capacity of seaman.<sup>2</sup> And perhaps if his wages as seaman have not been paid, and he libels the owners for them, the court, having jurisdiction, would include all that was due to him for further service.<sup>3</sup> It has been held that an assignee of the wages of a seaman, cannot maintain an action *in rem* in the admiralty.<sup>4</sup>

The English courts of admiralty declined for a long time jurisdiction in what are called *petitory* suits, in which the mere title to property is in question or litigation. Quite recently this jurisdiction has been restored and exercised; and we have no doubt that

<sup>1</sup> See *Phillips v. The Thomas Scattergood*, Gilpin, 1. It did not clearly appear in this case whether the libellant had been regularly discharged or not, but the court held that this made no difference; that as the voyage was ended for which the libellant had shipped, he was at liberty to depart, and that if he was afterwards employed to watch the ship, it was not in continuation of his former service, and, not being of a maritime nature, no suit would lie in admiralty. See also *Graham v. Hoskins*, Olcott, Adm. 224.

<sup>2</sup> *Pitman v. Hooper*, 3 Sumner, 50; *Brown v. Lull*, 2 id. 443. See *The Saratoga*, 2 Gallis. 164.

<sup>3</sup> It is very clear that the seaman may recover his wages, although during part of the time he performed services which were not strictly maritime in their nature. See *The Jane & Matilda*, 1 Hagg. Adm. 187. And it would clearly seem that he could do so, although the voyage was ended, if he was retained on board and his original wages were not paid. *The Gazelle*, 1 Sprague, 378. In the case of *The Sloop Canton*, 1 Sprague, 437, part of the service was the laying of stone in the building of a wharf. It was urged that this was not a maritime service, but Judge *Sprague* held that it was so far connected with and subservient to the maritime service of navigating the vessel, that the whole might be deemed maritime. The learned judge stated the general rule thus: "If the contract is for the navigation of tide waters and the transportation of merchandise thereon, and the laying stone, which constitutes the cargo of a vessel, into the wall of the wharf as it is discharged, is merely incidental and subsidiary to the principal business, the whole service may be considered maritime. But if, on the contrary, the navigation is merely incidental and subsidiary to the principal business of the owner or hirer of the vessel, such, for example, as the transportation across a river of the stone to be used by him in the construction of a building upon which he is engaged, then the contract as a whole would not be maritime." See also *McCormick v. Ives*, Abbott, Adm. 418.

<sup>4</sup> *Patchin v. The A. D. Patchin*, U. S. D. C. Northern District of New York, 12 Law Rep. 21.

formerly suits of this description came before the courts as freely as *possessory* suits, in which an owner by legal title demands that a possession, which is unjustly withheld, should be restored to him.<sup>1</sup> In this country, no such distinction is made, one class of actions being as much within the reach of the court as the other.<sup>2</sup> It would seem also that the courts have jurisdiction over

<sup>1</sup> Of this, *Kent* says, Vol. I. p. 371, "The distinction does not appear to rest on any sound principle, for the question of title is necessarily involved in that of the possession;" and the remarks of Sir *Wm. Scott*, show the great embarrassment in which the court is thrown by this unjust and arbitrary restriction of their jurisdiction. In *The Aurora*, 9 Rob. Adm. 133, 136, he said: "It is well known that it was formerly held for a very long time, and down to no very distant period, to be within the jurisdiction of this court to examine and pronounce for the title of ships, on questions of ownership. It was not till some time after the Restoration, I believe, that it was informed by other courts that it belonged exclusively to them; since that time, the court has been very cautious not to interfere at all in questions of this nature." In *The Warrior*, 2 Doda. 288, 289, he said: "A question of title may occur incidentally in a cause of possession, and it then becomes necessary for the court to inquire into the title, at least so far as to satisfy itself that it may safely decree possession to the party seeking it. It cannot be laid down that the court is to decline its jurisdiction in a cause of possession, on the mere averment of one of the parties that there is a conflicting claim of title." In *The Pitt*, 1 Hagg. Adm. 240, 244, he said: "I may, therefore, lay it down as a rule for the conduct of this court, that it is only in simple cases, in cases which speak for themselves, that it can act with effect; but in those which, being complex, require a long and minute investigation, it cannot proceed with safety." Sir *C. Robinson* followed these decisions closely in *The John*, 2 Hagg. Adm. 305; *The Fruit Preserver*, id. 181. See also *The Martin* of Norfolk, 4 Rob. Adm. 293. By 3 & 4 Vict. c. 65, the English court has its ancient power in these cases restored. This act provides that the court "shall have jurisdiction to decide all questions as to the title to, or ownership of any ship or vessel, or the proceeds thereof remaining in the registry, arising in any cause of possession, salvage, damage, wages, or bottomry, which shall be instituted in the said court after the passing of this act." Before this act was passed, it was uniformly held that the court could look only to the legal title, and not to a beneficial or equitable interest. *The Sisters*, 5 Rob. Adm. 155. Judge *Conkling* remarks that "it appears, by a case since decided, that this principle is still adhered to by the court, notwithstanding its enlarged powers and modified constitution." 1 Adm. Juris. 339, citing *The Valiant*, 1 W. Rob. 64. This case was, however, decided in July, 1839, before the passage of the act in question, which was on the 7th day of August, 1840.

<sup>2</sup> *Ward v. Peck*, 18 How. 267; *New England Ins. Co. v. Brig Sarah Ann*, 13 Pet. 387; *The Sch. Tilton*, 5 Mason, 465; *The Friendship*, 2 Curtis, C. C. 426; *Taylor v. The Royal Saxon*, 1 Wallace, C. C. 311; *The Taranto*, 1 Sprague, 170. We shall consider this subject more fully hereafter. See *post*, c. 7, sect. 1.

contracts of consortium<sup>1</sup> and wharfage<sup>2</sup> and towage.<sup>3</sup> But there is no jurisdiction in matters of account between part-owners,<sup>4</sup> although the part-owners sailed the vessel, and the libellant was a carpenter on board.<sup>5</sup> And equitable co-owners of a vessel, who are also material men, cannot sue in admiralty the other co-owners to secure their bill for supplies, if their claim constitutes a portion of the accounts of the part-owners.<sup>6</sup>

So where several persons join together to carry on an adventure in trade for their mutual benefit, one contributing a vessel, and the other his skill, labor, experience, etc., and there is to be a communion of profits on a fixed ratio, it is a contract over which a court of admiralty has no jurisdiction.<sup>7</sup> But the fact that the master of a vessel is part-owner, and in his capacity of owner is indebted to the other owners, does not prevent him from suing them for his wages as master.<sup>8</sup> There is no jurisdiction over an account between the owners of a vessel and their general agent for money

<sup>1</sup> *Andrews v. Wall*, 3 How. 568. The appellees, in this case, had filed a petition in the admiralty court in Florida, setting forth that they were owners of a schooner, which had been consorted with the sloop *Globe* in the business of wrecking. That while so consorted, the *Globe* had performed a salvage service, and that payment had been decreed her by the admiralty court, and that a portion of the salvage was due the petitioners by virtue of the consortium, and prayed that the sum due them might be retained by the court and paid to them. Mr. Justice *Story*, delivering the opinion of the court, held that they had, on general principles, jurisdiction to maintain the suit, that it was to enforce a maritime contract for services to be rendered on the sea, and an apportionment of the salvage earned therein. The jurisdiction was also sustained on the independent ground that the suit was for proceeds in the hands of the admiralty, and that such suits might always be maintained by the parties in interest.

<sup>2</sup> *Ex parte Lewis*, 2 Gallis. 483; *The Phebe*, Ware, 360; *Johnson v. The M'Donough*, Gilpin, 101. See *Ives v. The Buckeye State*, 1 Newb. Adm. 69; and *Russel v. The Asa R. Swift*, id. 553.

<sup>3</sup> *Ward v. Brig Banner*, U. S. D. C. Michigan, 14 Law Rep. 465.

<sup>4</sup> *Steamboat Orleans v. Phœbus*, 11 Pet. 175. And in a late case where the master of a vessel who was also part-owner, made a contract of affreightment with a lumber company, of which he was also a member, and the cargo was consigned to him, the supreme court refused to take jurisdiction, on the ground that there being a complicated account to adjust, the matter more properly belonged to a court of equity. *Grant v. Poillon*, 20 How. 162.

<sup>5</sup> *Kellum v. Emerson*, 2 Curtis, C. C. 79.

<sup>6</sup> *Hall v. Hudson*, 2 Sprague, 65. See also *Hazard v. Howland*, id. 68.

<sup>7</sup> *Ward v. Thompson*, 22 How. 330.

<sup>8</sup> *Dexter v. Munroe*, 2 Sprague, 39.

paid to their use.<sup>1</sup> The court has no power to decree the sale of a ship for an unpaid mortgage, nor, on that account, can it declare a ship to be the property of the mortgagees, and decree the possession of it to be given to them.<sup>2</sup> And in a case where the owners of different vessels agreed to form a line for carrying passengers and freight between New York and San Francisco, they dividing the profits between them, it was held to be but a contract for a limited partnership, and that an action for a breach of it would not lie in admiralty.<sup>3</sup>

It has been held that a ship-broker who obtains a crew for a vessel has a lien on her for his services and for advances for their wages.<sup>4</sup>

But stevedores have no lien *in rem* for their services in loading a vessel.<sup>5</sup> Nor can they sue *in personam* for their services, in admiralty.<sup>6</sup> They may, however, proceed against remnants in the registry.<sup>7</sup> And a person employed to visit a vessel from time to time to see to her safety, ventilate her, and try her pumps, etc., cannot sue in the admiralty to recover compensation for his services, but he can maintain a suit if he navigates the vessel from

<sup>1</sup> *Minturn v. Maynard*, 17 How. 477.

<sup>2</sup> *Bogart v. Steamboat John Jay*, 17 How. 399, s. c. *nom.* *The John Jay*, 3 Blatchf. C. C. 67. In *Schuchardt v. Ship Angelique*, 19 How. 239, it was held where a mortgage existed upon the moiety of a vessel which was afterwards libelled, condemned and sold by process in admiralty, and the proceeds brought into the registry of the court, that the mortgagee could not file a libel against a moiety of the proceeds, but that his proper course should have been either to have appeared as claimant when the first libel was filed, or to have applied to the court by petition for a distributive share of the proceeds. In a note to *The Granite State*, 1 Sprague, 277, 278, it is said that prior to these cases, jurisdiction had been exercised over questions of property between the mortgagor and mortgagee both in Massachusetts and the Eastern District of Pennsylvania, in cases which have not been published.

<sup>3</sup> *Vandewater v. Mills*, 19 How. 82, *nom.* *Vandewater v. The Steamship Yankee Blade*, 1 McAll. C. C. 9.

<sup>4</sup> *The Gustavia*, Blatchf. & H. Adm. 189.

<sup>5</sup> *The Amstel*, Blatchf. H. Adm. 215; *The Bark Joseph Cunard*, Olcott, Adm. 120; *McDermott v. The S. G. Owens*, 1 Wallace, C. C. 370.

<sup>6</sup> *Cox v. Murray*, Abbott, Adm. 340. The action in this case was to recover damages for the breach of an executory contract, no services having been actually performed. But the language of the court, both in this case and in those cited in the preceding note, fully sustains the position of the text.

<sup>7</sup> *Emerson v. Proceeds of The Pandora*, 1 Newb. Adm. 438.

one anchorage to another.<sup>1</sup> And a person hired to scrape the bottom of a vessel, preparatory to her being coppered, cannot sue in admiralty.<sup>2</sup> So the expense of compressing a cargo for the purpose of more convenient stowage, the cost of advertising the vessel for sea, and posting the advertisements, commissions for procuring freight, and wages of lightermen, do not give a lien on the ship.<sup>3</sup> Nor has a ship-broker any lien on the vessel for services in drawing a contract between the owner of horses shipped as part of the cargo, and persons who were to accompany the vessel and take charge of the horses, as hostlers.<sup>4</sup>

It has also been determined that the admiralty has no jurisdiction over a preliminary agreement to execute a maritime contract, and Mr. Justice Story has said that, "if there were a contract to build a ship, or to sign a shipping paper, or to execute a bottomry bond, and the party refused to perform it, it has never been my impression that the enforcement of such a contract belonged to the admiralty." <sup>5</sup>

<sup>1</sup> *Gurney v. Crockett*, Abbott, Adm. 490.

<sup>2</sup> *Bradley v. Bolles*, Abbott, Adm. 569.

<sup>3</sup> *The Bark Joseph Cunard*, Olcott, Adm. 120.

<sup>4</sup> *The Gustavia*, Blatchf. & H. Adm. 189.

<sup>5</sup> *Andrews v. Essex F. & M. Ins. Co.*, 3 Mason, 6, 16. See also *The Sch. Tribune*, 3 Sumner, 144. In *The Pacific*, 1 Blatchf. C. C. 569, a contract to carry a passenger from New York to San Francisco was broken before the ship sailed, by the refusal of the owners to comply with their agreement in respect to the fitting up of the vessel, and the number of passengers that were to be carried. It was held that the admiralty had jurisdiction.

## CHAPTER II.

OF THE JURISDICTION OF THE SEVERAL COURTS OF ADMIRALTY  
IN THIS COUNTRY.

## SECTION I.

## THE SUPREME COURT OF THE UNITED STATES.

THIS court has no original jurisdiction in admiralty, but receives appeals from the circuit court, where the matter in dispute exclusive of costs, exceeds the sum or value of two thousand dollars.<sup>1</sup> If the matter in controversy is exactly two thousand dollars, no appeal lies.<sup>2</sup> This is also held to mean a property value, and unless the fact of value is shown on the record, or by evidence *aliunde*, the court has no jurisdiction to hear or to re-examine the case.<sup>3</sup>

No appeal lies from the district court to the supreme.<sup>4</sup> And it must appear from the record that the circuit court had jurisdiction of the case, by an appeal to it duly entered in the district court.<sup>5</sup> If the libellant claims less than a sum exceeding two thousand dollars, he cannot appeal by showing that interest being added makes up the requisite amount, unless the interest is specially

<sup>1</sup> Act of March 3, 1803, c. 40, § 2, 2 U. S. Stats. at Large, 244.

<sup>2</sup> *Walker v. United States*, 4 Wallace, 163. It is not sufficient to claim that the damages are "eighteen hundred dollars and upwards." *Olney v. Steamship Falcon*, 17 How. 19.

<sup>3</sup> Thus where a decree was made against the claimant of a vessel and his sureties, and they were arrested, but afterwards released on *habeas corpus*, on the ground that they could not be imprisoned, as the law of the State had abolished imprisonment, and a writ of error was then taken by the libellant, it was held that the supreme court had no jurisdiction of the case. *Pratt v. Fitzhugh*, 1 Black, 276.

<sup>4</sup> *The Sloop Sally v. The United States*, 5 Cranch, 372.

<sup>5</sup> *Ballance v. Forsyth*, 21 How. 389. In this case the court allowed the appellant leave to withdraw the transcript which had been filed, and to use it on the appeal being brought again before the court.

claimed in the libel.<sup>1</sup> If judgment is given for the libellant, for an amount less than a sum exceeding two thousand dollars, the respondent cannot appeal by showing that the interest on the judgment, at the time of the appeal, added to the judgment, amounted to more than two thousand dollars.<sup>2</sup> And affidavits that the matter in dispute exceeds two thousand dollars, are not admissible.<sup>3</sup> In a case where, upon a libel to recover damages against ship-owners, a decree was passed in the circuit court against them for over two thousand dollars, with leave to set off a sum due them for freight, and the respondents elected to set off the balance, and a decree was then entered for less than two thousand dollars, it was held that no right of appeal to the Supreme Court existed, although the proctors for the respondents, at the time of making their election, filed a statement in writing, that the election to set off was made without waiver of their right to appeal from the decree.<sup>4</sup> The court will also take jurisdiction where the decree in the circuit court was rendered *pro forma* because the presiding judge had been of counsel in the case.<sup>5</sup> But the court will not take jurisdiction by agreement of parties, if the amount in dispute, however agreed by counsel, is shown by the case not to be sufficient,<sup>6</sup> or if on account of some

<sup>1</sup> *Udall v. Steamship Ohio*, 17 How. 17; *Olney v. Steamship Falcon*, 17 How. 19. See *Godfrey v. Gilmartin*, 2 Blatchf. C. C. 340.

<sup>2</sup> *Knapp v. Banks*, 2 How. 73; *Walker v. United States*, 4 Wallace, 163.

<sup>3</sup> *Richmond v. City of Milwaukee*, 21 How. 391. Where several persons join in a libel and claim damages amounting in the aggregate to over two thousand dollars, and one of them only appeals to the Supreme Court, he may show by affidavits that his damage exceeded two thousand dollars. *The Grace Girdler*, 6 Wallace, 441.

<sup>4</sup> *Sampson v. Welsh*, 24 How. 207.

<sup>5</sup> *Steamer Oregon v. Rocca*, 18 How. 570.

<sup>6</sup> *Mordelcai v. Lindsay*, 19 How. 199. In *Gruner v. The United States*, 11 How. 163, the vessel was seized for a violation of the registry laws, and while the suit was pending in the district court, a written agreement was filed by the district attorney and the proctor for the claimant, that the vessel should be sold and the proceeds paid into the registry of the court, to abide the ultimate decision of the suit, the rights of neither party to be prejudiced by the sale. The vessel was sold for \$850, and was afterwards condemned. There was an agreement on record, signed by the attorneys of the parties, admitting that the vessel was worth over two thousand dollars. The court held that the admission of the parties would be evidence of the value if nothing more appeared in the record, but that the consent of the parties could not give the court jurisdiction, and that, as it appeared on the face of the record that the sum in controversy was below two thousand dollars, the appeal must be dismissed.

informality the appeal should be dismissed,<sup>1</sup> or if the case is not of a maritime nature.<sup>2</sup>

The Supreme Court has also "power to issue writs of prohibition to the district courts, when proceeding as courts of admiralty and maritime jurisdiction."<sup>3</sup> This writ is issued where the district court has not jurisdiction of the cause brought before it.<sup>4</sup> The writ commands the person to whom it is directed not to do something which, by the suggestion of the relator, the court is informed he is about to do. If the thing is already done, the writ of prohibition cannot undo it, and the only effect of the writ is to suspend all action, and to prevent any further proceeding. Hence, in a case where a writ was applied for to prevent a judge of a district court from proceeding any further in a certain cause in admiralty, and a rule was granted on the judge to show cause why the writ should not issue, and the judge thereupon, after the rule had been served upon him, on petition of the libellant, dismissed the suit, it was held that there was no ground for issuing the writ, as the suit was ended.<sup>5</sup>

## SECTION II.

### THE CIRCUIT COURTS OF THE UNITED STATES.

These courts have only an appellate admiralty jurisdiction from a district court, where the matter in dispute, exclusive of costs, exceeds the sum or value of fifty dollars,<sup>6</sup> and the appeal can be made only from *final* decrees of a district court.<sup>7</sup> As to all pro-

<sup>1</sup> *Montgomery v. Anderson*, 21 How. 386; *Ballance v. Forsyth*, id. 389.

<sup>2</sup> *Cutler v. Rae*, 7 How. 729.

<sup>3</sup> Act of 1789, c. 20, 1 U. S. Stats. at Large, 81.

<sup>4</sup> *United States v. Peters*, 3 Dallas, 121.

<sup>5</sup> *United States v. Hoffman*, 4 Wallace, 158. It was also held in this case that the fact that there were other suits pending against the same relator, of the same character, in the same court, could have no legal force in the case before the court. It was said that if the relator could satisfy the court that the other cases were proper cases for the exercise of their authority, the court would probably issue writs instead of a rule.

<sup>6</sup> Act of March 3, 1803, c. 40, § 2, 2 U. S. Stats. at Large, 244.

<sup>7</sup> Thus where a final decree of condemnation had been made of forfeited property, and no appeal had been interposed, and, after execution had been issued, the



ceedings subsequent to the appeal, they are incidents of the principal cause, and belong to the court which remains in possession thereof, and the property therefore follows the appeal into the circuit court.<sup>1</sup> If there be an appeal to the supreme court, the property, in proceedings *in rem*, remains in the circuit court, and will be disposed of as the supreme court directs.<sup>2</sup>

The jurisdiction, both of the circuit and district courts, in prize as well as other causes, is limited by the bounds of their respective circuit or district; and it is therefore essential that the *person* or the *thing* against which the suit is directed, be within their local jurisdiction.<sup>3</sup> The exceptions to this rule are those for which

parties obtained a remission from the secretary of the treasury, and petitioned the district court that the executions which had been issued might be superseded, and they permitted to comply with the terms of the remission, and the district court having refused to grant the petition, the petitioners appealed to the circuit court, the court dismissed the appeal, on the ground that it was not regularly before the court. The final decree was made some time before, and no appeal had been made, and it had been settled in *McLellan v. United States*, 1 Gallis. 227, "that this court has no jurisdiction over the proceedings on the bond, which is but an admiralty stipulation, unless it has possession of the cause to which it belongs." *The Brig Hollen*, 1 Mason, 431. See also *Mordecai v. Lindsay*, 19 How. 199, and cases *supra*.

<sup>1</sup> *The Grotius*, 1 Gallis. 503; *Hayford v. Griffith*, 3 Blatchf. C. C. 36; *The Collector*, 6 Wheat. 194. In this case, it is said to be irregular for the marshal to distribute proceeds without order of court, but the irregularity may be cured by consent of all parties, if there be no *mala fides*.

<sup>2</sup> *The Collector*, 6 Wheat. 194. The 24th section of c. 20, Acts of 1789, 1 U. S. Stats. at Large, 85, prescribes that "the Supreme Court shall not issue execution in causes that are removed before them by writs of error, but shall send a special mandate to the circuit court to award execution thereon." The act of 1803, c. 40, which changes the mode of carrying the case up from a writ of error to an appeal, provides that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed by law in cases of writs of error.

<sup>3</sup> In *Ex parte Graham*, 4 Wash. C. C. 211, 212, the court, speaking of the inability of the courts to carry process out of their own districts, and reciting the provisions of the Judiciary Act of 1789, said: "These provisions appear most manifestly to circumscribe the jurisdiction of those courts as to the person of the defendant, by the limits of the district where the suit is brought; and that the process of those courts was considered by the legislature to be bounded by the same limits, is very obvious from two subsequent acts passed; the one on the 2d of March, 1793, authorizing subpoenas for witnesses to attend in the courts of one district to run into any other district, not exceeding in civil cases one hundred miles from the place of holding the court; and the other on the 3d of March, 1797, which authorizes writs of execution upon judgments obtained at the suit of

express provision is made by law. It would seem to follow, therefore, that no court can send process into another district than that in which it sits, to compel appearance; nor can a *prize* proceeding be directed against a person who is neither an inhabitant of nor actually within the district where process is served. So a decree against merchandise rendered in one district is valid against the merchandise, if it appear that the party charged with it had or has possession of it or of its proceeds; and it may be enforced on proper application to courts of other districts. But a libel in another district, against a resident citizen thereof, for the value of the merchandise, he being charged with having come into possession of it since the condemnation, cannot be sustained if he pleads that he was no party to the proceedings in the district where the decree was made, and that no process was served upon him there.<sup>1</sup>

If on appeal to the circuit court it appears that the judge is in anyways concerned in interest therein, or has been of counsel for either party, or is so related to or connected with either party as to render it improper for him, in his opinion, to sit in the trial of such suit, it is the duty of such judge, on application of either party, to cause the facts to be entered on the records of the court, and also to make an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next convenient circuit court in the next adjacent State, or in the next adjacent circuit;<sup>2</sup> which circuit court shall,

the United States, in any of their courts in one State, to run, and be executed, in any other State or Territory. It is very apparent that these provisions were made, not because they were supposed by Congress to be necessary in consequence of the eleventh section of the judicial act before mentioned, but because the jurisdiction of the courts was essentially confined by their organization within the limits of their respective districts, for, it is to be observed, that that section applies exclusively to *original suits*, and to the *parties to those suits*, and therefore it imposed no restraint as to writs of execution, and subpoenas for witnesses, so as to render the above provisions at all necessary." See also *Toland v. Sprague*, 12 Pet. 300, 330; and *post*, p. 218.

<sup>1</sup> For the rules in these cases, see *Wilson v. Graham*, 4 Wash. C. C. 53; *Ex parte Graham*, 4 Wash. C. C. 211.

<sup>2</sup> In *Richardson v. City of Boston*, 1 Curtis, C. C. 250, the plaintiff was a citizen of Rhode Island and brought suit in the United States circuit court in the district of Massachusetts. Both the judges of that court being disqualified, the case had to be removed to another circuit, and the question was whether it should

upon such record and order being filed with the clerk thereof, take cognizance thereof in the same manner as if such suit or action had been rightfully and originally commenced therein, and shall proceed to hear and determine the same accordingly, and the proper process for the due execution of the judgment or decree rendered therein, shall run into and may be executed in the district where such judgment or decree was rendered, and also in the district from which such suit or action was removed.<sup>1</sup>

### SECTION III.

#### THE DISTRICT COURTS OF THE UNITED STATES.

The statute of 24th September, 1789,<sup>2</sup> gave to these courts original cognizance of all civil causes of admiralty and maritime jurisdiction; and they thereby acquired all the powers of the courts of admiralty, both on the instance and the prize sides, and have jurisdiction of all cases of maritime trespass or tort.<sup>3</sup>

The original jurisdiction of the district court is not ousted by any State laws which relate to the same subject. As for example, laws respecting pilotage or liens of mechanics or material men,

be removed to the circuit court of Rhode Island or of New York. The case was ordered to be certified to Rhode Island. *Curtis, J.*, said: "The leading idea of the law is, I think, proximity of place; and that circuit court which is competent to act, and nearest to the subject of the controversy, the witnesses, the parties, and the court whence the removal is to take place, is the most convenient circuit court within the meaning of this act." The learned judge also said: "There are two governing elements contained in the statute. The first is, 'the most convenient circuit court'; the second, 'in the next adjacent state or circuit.'" It is not difficult to see why the alternative was given, allowing a removal to a circuit court in the next adjacent circuit, instead of confining it to the next adjacent State. In admiralty appeals, or writs of error from the district court, if the judge of the Supreme Court be interested, it would not be in accordance with our system, and scarcely decorous in itself, to remove the cause to another district in the same circuit, to be heard by another district judge; and it is possible that a circuit court might not be found in the next adjacent State."

<sup>1</sup> Act of 1839, c. 36, § 8, 5 U. S. Stats. at Large, 322.

<sup>2</sup> Ch. 20, § 9, 1 U. S. Stats. at Large, 76.

<sup>3</sup> *Davis v. A New Brig, Gilpin*, 473; *The Amiable Nancy*, 1 Paine, C. C. 111, 3 Wheat. 546, and cases cited in the reporter's note; *Keene v. The United States*, 5 Cranch, 304.

even if their laws are adopted and enforced by the courts of the United States.<sup>1</sup> Their effect is, then, to give to the State courts a jurisdiction on these subjects concurrent with that of admiralty. A party may elect to go into either court, but if he goes into admiralty he will recover there no more than the State laws would permit him to recover in the State courts. In such a case, and in all other cases where the State court and the United States court have concurrent and co-ordinate jurisdiction, the right to maintain jurisdiction belongs to that court which exercises it first and takes possession of the thing. If, therefore, the sheriff attach property, and it is afterwards libelled in the district court, and process of attachment is delivered to the United States marshal, he should return the previous attachment, and not attempt to take it from the sheriff's hands.<sup>2</sup> The same may be true where the State court has, by virtue of a special statute, power to enforce to the same extent the claim which is the subject of the suit in the admiralty court, in which case the party would lose nothing by being deprived of his right to sue in admiralty.<sup>3</sup>

Further than this we are not inclined to go, and were the question still an open one, we should say that the lien for seamen's wages might be enforced in the admiralty court against the vessel, notwithstanding she was under arrest in the State court. Our reasons for this are that the lien for wages is by our law paramount, and would attach to the ship notwithstanding she were sold by order of a State court, and consequently no injury could result to the attaching creditor; and also on account of the great hardships which result from depriving seamen of their wages while the suit in the State court is dragging its weary length along,

<sup>1</sup> *Hobart v. Drogan*, 10 Pet. 108.

<sup>2</sup> *Hagan v. Lucas*, 10 Pet. 400; *The Oliver Jordan*, 2 Curtis, C. C. 414; *The Robert Fulton*, 1 Paine, 620. It was held, in these last two cases, that a material man could not enforce his lien in the admiralty court, while the vessel was under arrest by State process by another material man.

<sup>3</sup> *Keating v. Spink*, 3 Ohio State, 105. It was held, in this case, that a sheriff who had a vessel under arrest by process under the water-craft law of the State, had no right to surrender it to the United States marshal on a suit for seamen's wages in the admiralty court, and that he was liable to the creditor in the suit in the State court for having given up the possession. Some reliance was placed on the distinction pointed out in the text, that by the law of Ohio the seamen might have intervened and had their claim for wages satisfied in the State court.

through several years.<sup>1</sup> But a majority of the Supreme Court of the United States having decided otherwise, we must take the law as we find it, and accordingly state that when a vessel is under arrest by a State court, for any debt of the owner, the power of the admiralty is for the time entirely suspended.<sup>2</sup> But the sheriff

<sup>1</sup> This precise point arose in the case of *Poland v. The Brig Spartan*, Ware, 134, 147. The suit was brought in the district court of Maine, for seamen's wages, against the freight and cargo of the vessel. One defence was that the property had been attached by sundry creditors of the charterers, and the suits were then pending in the State court. Judge Ware said: "It is argued that, as different creditors are each pursuing their own rights against this property in different courts, it is a proper rule, to prevent collision of judicial authority, to give precedence to those who first lay their hands on the fund. This priority might be decisive, if both creditors stood in the same relation to this specific property. But the reason no longer holds when the claim of one of the parties is in its nature a privileged claim. The very essence of a privilege is to give the creditor a preference over the general creditors of the debtor; and if such be the claim of the seamen, the attachment only created a lien on the property subject to such prior incumbrance. It can only extend to the whole right of the owner, and that was to hold the property after discharging the lien." And in *Certain Logs of Mahogany*, 2 Sumner, 589, which was a libel *in rem* for freight, it was objected that a replevin suit was then pending in the State court to determine the right of property to the cargo libelled. Story, J., said: "A suit in a State court by replevin, or by an attachment under process, of the property, can never be admitted to supersede the right of a court of admiralty to proceed by a suit *in rem* to enforce a right against that property, to whomsoever it may belong. The admiralty suit does not attempt to enter into any conflict with the State court, as to the just operation of its own process; but it merely asserts a paramount right against all persons whatever, whether claiming above or under that process. No doubt can exist that a ship may be seized under admiralty process for a forfeiture, notwithstanding a prior replevin or attachment of the ship then pending. The same thing is true as to the lien on a ship for seamen's wages or a bottomry bond." See also *Riggs v. The Sch. John Richards*, 1 Newb. Adm. 73.

<sup>2</sup> In *Taylor v. Carryl*, 24 Penn. State, 259, the vessel arrived in Philadelphia in October, 1847. She was attached in the State court for a debt due from her owners in November of that year. A libel for wages was filed in the admiralty court, January 21, 1848. A sale was ordered by that court on the 4th of February, and the vessel was sold by the marshal on the 15th of the same month. *Wall v. The Royal Saxon*, 2 Am. Law Reg. 324. In the State court a sale was ordered on the 29th of January, and the vessel was sold on the 9th of February. The present suit was an action of replevin to determine the title as between the purchasers at the two sales, and the court held that the district court had no power over the property while it was in the possession of the State court. The charge of Woodward, J., at *Nisi Prius* may be found in 2 Am. Law Reg. 333. While the replevin suit was pending, the purchaser of the vessel under the sale by the marshal

may waive his right of possession, and if the marshal can obtain possession of the vessel with his consent, or with the consent of his deputy, the right of the sheriff is at an end.<sup>1</sup> A question of a similar nature may arise, when the freight of a vessel is liable, and a monition issues from the admiralty ordering the person in possession of it to pay it into court. Is it any defence for the per-

instituted a petitory suit in the district court, and the vessel was ordered to be delivered to him. On appeal to the circuit court, Mr. Justice *Grier*, though he was clearly of the opinion that the petitioner had a good title, yet held that the replevin suit pending in the State court was a good bar to further proceedings in admiralty. *Taylor v. The Royal Saxon*, 1 Wallace, C. C. 311. The suit in the State court was then brought before the Supreme Court of the United States by a writ of error, and the decision of the State court was held to be correct. 20 How. 583, *Taney*, C. J., *Wayne*, J., *Grier*, J., and *Clifford*, J., dissenting. We would call the attention of the profession to the opinion of the learned chief justice in this case, as one which has been seldom equalled, in a clear and forcible exposition of the rights and powers of the courts of admiralty in this country. After remarking that the power which had created the court could give the right of trial by jury, if it saw fit, the learned judge continued: "I can therefore see no ground for jealousy or enmity to the admiralty jurisdiction. It has in it no one quality inconsistent with or unfavorable to free institutions. The simplicity and celerity of its proceedings make a jurisdiction of that kind a necessity in every just and enlightened commercial nation. The delays unavoidably incident to a court of common law, from its rules and modes of proceedings, are equivalent to a denial of justice, where the rights of seamen or maritime contracts or torts are concerned, and seafaring men the witnesses to prove them; and the public confidence is conclusively proved by the well-known fact, that, in the great majority of cases, where there is a choice of jurisdictions, the party seeks his remedy in the court of admiralty in preference to a court of common law of the State, however eminent and distinguished the State tribunals may be." See also *Freeman v. Howe*, 24 How. 450; *Buck v. Colbath*, 3 Wallace, 342; *The Circassian*, 1 Bened. Adm. 128. In *The Gazelle*, 1 Sprague, 378, the court refused to issue a warrant of arrest while the vessel was in the custody of the State court, but as soon as she was sold by the sheriff granted the requisite permission, holding that the sale did not divest nor impair the lien of the seamen for wages.

<sup>1</sup> *The Julia Ann*, 1 Sprague, 382. The vessel, in this case, was in the custody of the sheriff, and in possession of a keeper appointed by the sheriff, and the party in possession had written authority from the sheriff to hold the vessel. This fact was not disclosed to the marshal, but the keeper consented to hold the vessel under the marshal, and did so until the sale, and received his fees therefor. When the sheriff was informed that the keeper was holding under the marshal, he did not oust him, but said he knew nothing about the marshal, and told the keeper to keep on, and no action was taken in the court till after the sale. Under these circumstances the court held that the purchaser at the sale by the marshal was entitled to possession.

son to say, that prior to the issuing of the monition he was summoned by a trustee or garnishee process, in a State court, and the freight attached? It has been held that this is no defence, and that the freight must be paid into the admiralty court.<sup>1</sup>

If a person who has a claim against a vessel, as, for example, a material man,<sup>2</sup> or a seaman,<sup>3</sup> brings a suit in a common-law court and attaches the vessel, he may discontinue such suit, and sue *in rem* in admiralty, as the lien, not depending on possession, is not lost by such an attachment.

We have no doubt that a suit cannot be brought against a vessel owned by government;<sup>4</sup> nor can a private claim be the subject of a suit on the instance side of the court, after a vessel has been captured *jure belli*,<sup>5</sup> although the libel is filed before proceedings are begun in the prize court.<sup>6</sup>

At common law, if the property of one person is attached as the property of another, the former may assert his right of property by a writ of replevin, and it has been held, that he may do the same in admiralty by a petitory suit.<sup>7</sup> In England, a ship was

<sup>1</sup> The *Sailor Prince*, U. S. D. C. New York, *Blatchford*, J., June, 1867. This was a libel for wages by the seamen against the ship and freight. A monition issued against the consignees of the cargo, and they replied that the owners of the vessel had been previously sued in the supreme court of New York, and the freight had been attached in their hands. It did not appear that the State officer had the actual possession of the freight money, but the court put the case on the broad ground that *Taylor v. Carryl* did not apply, and that the lien of the seamen must be enforced by the admiralty court in preference to the claim of a general creditor, and that if the proceedings in the State court should be a bar, the seamen would be without remedy, as the money could not be followed, whereas, in the case of the attachment of a vessel, the only injury resulting from the proceedings in the State court would be the delay, as the vessel could be seized for the lien of the seamen after her sale by the State officer. A similar decision was made by Judge *Lowell*, in the case of *The Caroline*, U. S. D. C. Mass., 1867.

<sup>2</sup> *The Paul Boggs*, 1 *Sprague*, 369.

<sup>3</sup> *The Sch. Highlander*, 1 *Sprague*, 510.

<sup>4</sup> See *Briggs v. Light-Boats*, 11 *Allen*, 157.

<sup>5</sup> The question whether the property belongs to the government should not be decided before an appearance, and on motion. *The Othello*, 1 *Bened. Adm.* 43.

<sup>6</sup> *The Nassau*, 4 *Wallace*, 634.

<sup>7</sup> *The Taranto*, 1 *Sprague*, 170. While acquiescing in the justice of this decision, we do not see how the marshal could take the vessel under the decision in *Taylor v. Carryl*, *supra*. And this case is a good example of the power of a person to effectually deprive the court of admiralty of its entire jurisdiction, under

seized by a sheriff upon process from the court of King's Bench; afterwards, admiralty process issued in a suit for wages, under which she was sold, and the claim of the sheriff to the surplus proceeds was allowed as against the former owner of the ship, on the ground that admiralty would take a judgment on record as a debt, although it would not inquire the claims of general creditors.<sup>1</sup>

The legislature of a State can neither amend the judgment nor determine the jurisdiction of any of the courts of the United States.<sup>2</sup>

The judge of the district court may hold court at any place within the district that "the nature of the business and his discretion shall direct";<sup>3</sup> and orders, generally, may be at chambers as well as in open court. It is said that the various *ex parte* orders which admiralty proceedings sometimes require quite suddenly, make this rule necessary.<sup>4</sup> It has, however, been seriously doubted by Mr. Justice Story whether the district court can receive stipulations in vacation and deliver property thereon, before

that decision. In the case of *The Taranto*, a company of miners were about to sail for California in a vessel which they had purchased, but which stood in the name of their agent, who refused to give up the vessel. The vessel was also under attachment in the State court, in a suit against the agent for supplies furnished. The court held that as the property did not belong to the agent the attachment was not valid, and decreed possession of the vessel to the libellants. As to the stores not paid for, it was decreed that the libellants could not be entitled to them. The opinion in this case was rendered in less than two weeks after the libel was filed, whereas if the owners had resorted to a writ of replevin, supposing they had been able to give bonds to double the value of the vessel, the case could not have been decided under a year, and probably would have been in court much longer, yet, if we understand the effect of the decision in *Taylor v. Carryl*, the common-law remedy was the only one left to the owners, although as their whole property was invested in the vessel, it might have been impossible for them to have availed themselves of it.

<sup>1</sup> *The Flora*, 1 Hagg. Adm. 298. The creditor, in this case, who seized the vessel under the authority of the King's Bench, consented to the sale, and claimed merely to come in for the surplus after paying the sum due the seamen. "But," says *Taney*, C. J., in *Taylor v. Carryl*, 20 How. 583, 603, "if the marshal could not lawfully arrest while she was in the possession of the sheriff, he could not lawfully sell under that arrest, nor while the sheriff still held possession, and no consent of parties would make it a valid marshal's sale, and give a good title to the purchaser, if the sale was without authority of law."

<sup>2</sup> *United States v. Peters*, 5 Cranch, 115.

<sup>3</sup> Act of 1789, ch. 20, § 3, 1 U. S. Stats. at Large, 73.

<sup>4</sup> *United States v. Sch. Little Charles*, 1 Brock. C. G. 380.



the return term of the process.<sup>1</sup> We believe, however, that this is done in practice, but we think not against the will or without the consent of the libellant.

If a suit is brought in the district court, and it appears that the judge "is in any ways concerned in interest, or has been of counsel for either party, or is so related to, or connected with, either party, as to render it improper for him, in his opinion, to sit on the trial of such suit or action, it shall be the duty of such judge, on application of either party, to cause the fact to be entered on the records of the court; and also an order that an authenticated copy thereof, with all the proceedings in such suit or action, shall be forthwith certified to the next circuit court of the district; and if there be no circuit court in such district, to the next circuit court in the State; and if there be no circuit court in such State, to the most convenient circuit court in an adjoining State; which circuit court shall, upon such record being filed with the clerk thereof, take cognizance thereof, in the like manner as if such suit or action had been originally commenced in that court, and shall proceed to hear and determine the same accordingly; and the jurisdiction of such circuit court shall extend to all such cases so removed as were cognizable in the district court from which the same was removed."<sup>2</sup>

We have spoken hitherto only of the courts which have admiralty jurisdiction within the United States; and it is certain that no courts can have this jurisdiction in the States but those which are established by Congress in pursuance of and in conformity with the third article of the Constitution of the United States.<sup>3</sup> But it is held that this limitation does not extend in this respect, at least, to the Territories; because Congress legislates for them with the combined powers of the State and general governments. An act of a Territory created a court with authority to take jurisdiction of a case of salvage; and in such a case which

<sup>1</sup> In *Ex parte Robbins*, 2 Gallis. 320, 322, *Story, J.*, said: "Admitting that the district court can deliver property on bail in vacation, and before the return term of the process (which admits of very serious doubts), no delivery on bail could properly be made without notice to the district-attorney (the United States being interested in the suit), and a hearing before the district judge." See also *Brig Alligator*, 1 Gallis. 145, 148.

<sup>2</sup> Act of 1821, c. 51, 3 U. S. Stats. at Large, 643.

<sup>3</sup> See *ante*, p. 154.

came before it, a decree of sale for salvage of a cargo which had been stranded and brought within its Territorial limits, was made by the Territorial court, and sustained by the Supreme Court, and a sale made under it was held to be valid and to have changed the property.<sup>1</sup>

<sup>1</sup> *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511, was as follows: The insurance company libelled 356 bales of cotton, in the South Carolina district, demanding restitution thereof, on the ground that the property had been abandoned to them by the owners. Canter, the claimant, claimed on the ground that they had been sold to him, by virtue of an order of a Territorial court of Florida, consisting of a notary and five jurors, to pay salvage assessed by them at 76 per cent. The district judge pronounced this decree a nullity, and ordered the restoration of the cotton, subject to 50 per cent salvage. The circuit court decreed the whole cotton to the claimant, on the ground that the proceedings of the court at Key West were legal, and transferred the property; and this decree was affirmed by the Supreme Court, Chief Justice *Marshall* delivering the opinion.

## CHAPTER III.

## OF APPEALS GENERALLY.

By an appeal, the judgment and decree of the court are suspended; and the whole cause, both as to its law and its fact, is to be heard *de novo* in the appellate court.<sup>1</sup> Nor is the cause a *res adjudicata*, until the final sentence of the appellate court. Any statute, therefore, which is passed before such final decree, is to be considered, and if the case before the court arose on a statute which is repealed<sup>2</sup> or expires by its own lim-

<sup>1</sup> Anonymous, 1 Gallis. 22. It was held in this case that the circuit court had authority to allow amendments in revenue cases or proceedings *in rem* brought by appeal from the district court. In Gloucester Ins. Co. v. Younger, 2 Curtis, C. C. 322, 335, the case came before the circuit court under an agreement that the decision of the district judge should be final on all questions of fact, and that no evidence should be introduced in the appellate court except the opinion of the district judge, or a statement of facts made thereon; but that all questions of law from facts proved, were to be open on appeal. Mr. Justice Curtis disapproved of this course and offered to discharge the agreement, but as neither party desired it, he determined the case on the agreement, although he stated that he had encountered much embarrassment in doing so, and should execute a similar agreement afterwards with much reluctance, if at all.

<sup>2</sup> An interesting case which finally turned on this point occurred in Louisiana. The Act of Congress of March 2, 1807, 2 U. S. Stats. at Large, 428, passed for the prevention of the slave-trade, directed that any vessel hovering about and intending to land negroes on the coast of the United States, should be forfeited, and the negroes delivered to any persons appointed by the several States for the purpose of disposing of them. The Josefa Segunda was libelled under this act, and the cargo of negroes delivered to the sheriff of Louisiana, in accordance with a statute of that State, which was passed in pursuance of the act of Congress, and which also directed that one half the proceeds of the sale of such negroes should be delivered to the treasurer of the Charity Hospital at New Orleans, and one half to the commanding officer of the capturing vessel, meaning the public vessel contemplated by the act of Congress. In 1820, the final decree of condemnation was pronounced in the Supreme Court. 5 Wheat. 338. In the mean time, the sheriff, by the consent of all parties, had sold the negroes and lodged the proceeds in the United States Bank, subject to the order of the court below. To the proceeds of this sale there were seven claimants, none of whom fell within the description, in the statute of Louisiana, of the individuals who should be entitled

itation<sup>1</sup> before the final decree is passed, the case is at an end. But if the property does not follow the case, the court in whose

to them. Their claims were, therefore, rejected by the Supreme Court, in 1825. 10 Wheat. 312. As to the proceeds of the sale of the vessel, the court said, 10 Wheat. 331, 332, "Upon the best consideration which we have been able to give the case, we are of opinion that it is a *casus omissus*, or rather that all the beneficial interest vests in the United States. . . . The remarks which have already been made, dispose of the case as far as respects the proceeds of the vessel; and we think they are decisive as to the claim to the proceeds of the sale of the negroes. The case, as to this matter, is also a *casus omissus* in the act of Louisiana."

In 1830, the case came up again, *nom.* United States v. Preston, 3 Pet. 57, on "appeal from so much of the decree of the court below as awarded to the State of Louisiana, the proceeds of the sales of certain slaves." The court said, "that as the final condemnation in this court took place March 13, 1820, and as previous to that time was passed the act of March 3, 1819 (3 U. S. Stats. at Large, 450 and 532), by which a new arrangement is made as to the disposal of persons of color, seized and brought in under any of the acts prohibiting the traffic in slaves, the power to deliver them to the order of the States was taken away before the final decree of this court." Then, according to the principle of *Yeaton v. United States*, 5 Cranch, 281, if they had been specifically before the court at the date of that decree, they must have been delivered, not to the State according to the act of 1807, but to the United States, according to the act of 1819. But they had already been sold, and the court said: "We would not be understood to intimate that the United States are entitled to this money, for they had no power to sell. Nor do we feel bound to remove the difficulties which grow out of this state of things." This was indeed a curious case. The slaves were sold by consent of the parties, before final condemnation of the vessel. The disposal of them was in violation of the law regulating such matters at the time of the decree. The sheriff, therefore, acted wrongfully, but was not liable to anybody, as he had only converted forfeited property into another form. But, under the laws relating to the slave-trade, there was no one who could claim this money; neither the State of Louisiana nor the claimants, for so the court decided; not the United States, for there is no law by which the United States receives the price of slaves; not the slaves themselves, of course. The \$65,000 deposited by the sheriff of the parish of New Orleans in the United States Bank lies there yet (or its remains lie there), so far as we know or can infer from the law.

<sup>1</sup> In *Yeaton v. United States*, 5 Cranch, 281, *Marshall*, C. J., said: "In admiralty cases, an appeal suspends the sentence altogether, and it is not *res adjudicata* until the final sentence of the appellate court is pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. . . . In prize causes, the principle has never been disputed, and in the instance court, it is stated in 2 *Browne's Civil Law*, that in cases of appeal it is lawful to allege what has not before been alleged, and to prove what has not before been proved. The court is, therefore, of opinion that this cause is to be considered as if no sen-

custody it remains may always make any proper and necessary order respecting it.<sup>1</sup>

Questions have arisen as to the effect of joinder of parties on the right of appeal. The statute defines the amount which gives the right; and in suits for torts, unless an *ad damnum* be claimed equal to the amount which gives the right of appeal, that right does not exist. But in admiralty, parties are permitted to join, for convenience and economy, whose rights and interests are so distinct and independent that they could not be joined at common law. And it seems to be now settled that no party can appeal, unless he has, himself, and separately from others, a claim, or unless the opposite party has recovered against him, separately, an amount which, by itself, is equal to that which, by the terms of the statute, gives the right of appeal. Thus, all the crew of a ship may join in libel for wages; but only he whose claim exceeds fifty dollars, separately considered, can appeal to the circuit court; and only he whose claim exceeds two thousand dollars can appeal thence to the Supreme Court.<sup>2</sup> And where several libels were filed by shippers of cargo to recover for damages done to their goods, and the actions were ordered to be consolidated by the court, it was held that the interests of the parties were distinct, and no appeal would lie, except where the separate amount demanded by each libellant exceeded two thousand dollars.<sup>3</sup> When, however, many libellants join in one libel, and their interests are joint, although not coequal, then an appeal lies, if the total amount exceed the sum required by the statute, although the amounts which would belong to each one is less.<sup>4</sup> If a suit is brought

tence had been pronounced; and if no sentence had been pronounced, it has long been settled, on general principles, that after the expiration or repeal of a law no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." See also *United States v. Ship Helen*, 6 Cranch, 203; *Schooner Rachel v. United States*, 6 Cranch, 329.

<sup>1</sup> *The Grotius*, 1 Gallis. 503, per *Story, J.*; *The Collector*, 6 Wheat. 194.

<sup>2</sup> *Oliver v. Alexander*, 6 Pet. 143.

<sup>3</sup> *Rich v. Lambert*, 12 How. 347.

<sup>4</sup> *Shields v. Thomas*, 17 How. 3. In this case, the representatives of a person deceased claimed, under a bill in equity, moneys which Shields, the administrator, had converted to his own use. The complainants filed a bill in the Chancery Court of Kentucky, and obtained a decree which exceeded \$ 2,000, the portion due each complainant being decreed to him separately, and being less than

against certain goods for freight, and two or more persons appear as claimants and give a joint bond, but each claims different parcels, and a decree is rendered against each one separately for the freight of the goods claimed by each, the rights of each are distinct and independent, and only those who are obliged to pay more than the sum specified in the statute, exclusive of costs, can appeal. And if the whole of the freight is jointly decreed against

\$ 2,000. A motion was made to dismiss the bill, because "the sum due each complainant is severally and specifically decreed to him, and that the amount thus decreed is the sum in controversy between each representative and the appellant" (Shields).

But the court held, "that the matter in controversy in the Kentucky court was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled when the amount was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a *common and undivided interest* in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves and not with him. It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds two thousand dollars, an appeal would clearly lie to this court, although the interest of each individual was less than that sum."

The court commented on the above cases as follows: "The case of *Oliver v. Alexander*, 6 Pet. 143, was a suit for seamen's wages. And although the crew are allowed by law, for the sake of convenience and to save costs, to join in a suit for wages, yet the right of each seamen is separate and distinct from his associates. His contract is separate, and his recovery does not depend upon the recovery of others, but rests altogether upon its own evidence and merits. And he does not recover a portion of the common fund to be distributed among the claimants, but the amount due to himself on his own separate contract. The case of *Rich v. Lambert*, 12 How. 347, was decided on the same ground. The several shippers who owned the goods which had been damaged had no common interest in the goods. The interest of each was separate, and his contract of affreightment was separate. And the libel of each was upon his own contract with the ship-owner, and for his individual and separate property. The cases of *Stratton v. Jarvis*, 8 Pet. 4, and *Spear v. Place*, 11 How. 522, were both salvage cases, where the property of each owner is chargeable with its own amount of salvage. The salvage service is entire; but the goods of each owner are liable only for the salvage with which they are charged, and have no common liability for the amounts due from the ship or other portions of the cargo. It is a separate and distinct controversy between himself and the salvors, and not a common and undivided one, for which the property is jointly liable."

the claimants, all should join in an appeal.<sup>1</sup> In respect to salvage claims, it has been decided that an appeal will not lie to the Supreme Court where the amount of salvage due from any one owner of the property saved is less than two thousand dollars, although the whole amount due exceeds that sum. In other words, although the suit may be *in rem* against all the property saved, yet the rights and liabilities of each owner are separate and distinct.<sup>2</sup> But we should be inclined to hold that the interests of salvors were so far joint that they might all appeal, if their united interest amounted to the requisite sum, provided the amount due from any one owner of the property saved was sufficient.<sup>3</sup>

If, however, the libellants in salvage formed two or more distinct sets or bodies, who performed distinct services and had distinct demands, they would not be regarded, we should presume, in the case of appeal, as one, although they joined in one libel; for they ought properly, and perhaps would be required, to file several libels, only those joining who rest on a community of service, of merit, and of demand.

Where several libels are filed for salvage against a vessel, and decrees are entered for all the libellants, and one appeals, his appeal may affect collaterally the other decrees, as if, for instance, the vessel of the appellant was entitled to the entire amount of salvage decreed, and not merely one third, as determined by the inferior court.<sup>4</sup>

It is said to be always prudent, if one party appeals, for the other party to appeal also. For if he do not, and it should happen that the appellate court thought him entitled to a more favorable

<sup>1</sup> *Clifton v. Sheldon*, 28 How. 481.

<sup>2</sup> *Stratton v. Jarvis*, 8 Pet. 4; *Spear v. Place*, 11 How. 522.

<sup>3</sup> This precise point has not yet been decided, but it would seem to fall within the principle adopted in the case of *Shields v. Thomas*, 17 How. 3, cited *supra*. See *Marvin on Wreck and Salvage*, § 253, 254, where the very learned author comes to the conclusion, that although the rights and interest of the salvors are separate and distinct, because "payment to one, or a release or forfeiture of the interest of one, being no bar to the recovery of the others," yet that they should be considered "as possessing a *quasi* joint interest for the purposes of appeals, and that they may appeal whenever their united demand against any single claimant equals the sum required by law to authorize an appeal."

<sup>4</sup> *The Island City*, 1 Black, 121. This was so stated by the court, but, as the appeal was dismissed, the manner in which the decree would be affected does not appear.

judgment, he would not have it without an appeal.<sup>1</sup> But what if he could not appeal? If a libellant in the district court for assault and battery lays his *ad damnum* at one hundred dollars and recovers fifty, he can appeal and the defendant cannot.<sup>2</sup> If he

<sup>1</sup> *Stratton v. Jarvis*, 8 Pet. 4; *Houseman v. Sch.* North Carolina, 15 Pet. 40, 50; *Canter v. American Ins. Co.* 3 Pet. 307, 318; *Airey v. Merrill*, 2 Curtis, C. C. 8; *Allen v. Hitch*, id. 147. In all these cases, with the exception of that of *Canter v. American Ins. Co.*, the libellant did not appeal, and it was held that he was limited to the amount which he had recovered in the inferior court. In *Canter v. American Ins. Co.*, the court had decreed restitution of the property to the claimant, but nothing was said as to damages. The libellant only appealed, and it was held that the claimant could not demand damages in the appellate court. In *Allen v. Hitch*, *Curtis, J.*, speaking of these cases, said: "These cases show that the appellate court will neither increase the amount awarded below, nor consider a subject of claim there decreed upon and denied, unless the party who desires a reversal of the decree take an appeal." In *The Water Witch*, 1 Black, 494, two consignees libelled the vessel by separate libels, for damages done to the cargo, and the owner of the vessel libelled the cargo for freight. The district court found that the amount of damages exceeded the freight, and made a decree for the consignees for the amount of damage less the freight. From this decree the claimant of the vessel appealed, but the consignees did not. Held that the circuit court had the power to alter the decree, giving the consignees the amount of the damage done and the claimant the freight due.

<sup>2</sup> *Shirley v. Titus*, 1 Sumner, 447. The rule being in all cases of this nature that the "matter in dispute" within the meaning of the statute is the amount claimed by the libellant, and not the amount actually recovered, but if the libellant recovers less and does not appeal, then the "matter in dispute" is the amount actually recovered, and the respondent has no right of appeal unless this amount is greater than the sum specified in the statute. *Gordon v. Ogden*, 3 Pet. 33; *Smith v. Honey*, id. 469; *Cooke v. Woodrow*, 5 Cranch, 13; *Wise v. Columbian Turnpike Co.* 7 Cranch, 276. But see *Wilson v. Daniel*, 3 Dall. 401; *Greigg v. Reade*, *Crabbe*, 64. In *Walker v. United States*, 4 Wallace, 163, Chief Justice *Chase* said: "It has been a good deal controverted whether the sum or value in controversy is to be determined by reference to the amount claimed, or the amount of the judgment, or the amount in dispute in this court. It has been long settled, however, that when the judgment is for the defendant or for the plaintiff, and for less than two thousand dollars, and the plaintiff sues out the writ of error, this court has jurisdiction if the damages claimed in the declaration exceed that sum; but that if judgment is for plaintiff and not more than two thousand dollars, and the defendant prosecutes in error, this court has not jurisdiction, for the amount in controversy, as to the defendant, is fixed by the judgment." See also *Knapp v. Banks*, 2 How. 73. In *Lee v. Watson*, 1 Wallace, 337, the writ and original declaration showed that the amount in controversy did not exceed one thousand dollars; the evidence offered on the trial by the plaintiff showed that it did not exceed seven hundred dollars. In the court below, leave



appeals, and upon the new trial a full defence, or circumstances greatly lessening the libellant's claim were put in proof, we should be unwilling to say that the court could not regard them. We know of no authority for this, and should infer from the general principles of admiralty, that such a result would follow only where the party who did not appeal might have done so had he thought proper. Indeed, we should ourselves incline to the view, that if either party appeals, the rule that the appellate court tries the whole case, *de novo*, would cause the same justice to be done to both parties, as if both could have appealed, and both had appealed.

If the libel be for a maritime trespass, or assault and battery against two or more, and there is a several decree, each defendant has the same rights of appeal that he would have if there were separate libels; and if the decree be joint, the rule is the same if the defendants sever in their pleas or answers, or, if their answer, though joint, be a denial in the nature of a plea of the general issue. But if they join in a justification, it is said they must join in an appeal from a joint decree.<sup>1</sup>

was given to amend the declaration by striking out the amount of damages and inserting two thousand one hundred dollars. The Supreme Court held that it had no jurisdiction, and said that reference must be had both to the debt claimed, and to the damages alleged, or the prayer for judgment. See *Ryan v. Bindley*, 1 Wallace, 66.

<sup>1</sup> In *Thomas v. Lane*, 2 Sumner, 1, this subject is very fully discussed. It was a libel brought by a seaman against the master and the mate. The respondents made a joint answer, alleging also some matters in individual justification of the assault. The district court decreed one hundred dollars, in which decree Jordan the mate acquiesced, but Thomas the master did not. *Story, J.*, said:—

“But the question here is not so much as to the effect of a joint justification or defence, as it is as to the several right of appeal of the parties charged with a tort in a joint libel. It seems admitted by the argument, that if the parties had severed in their defence (as they clearly might have done), that either of them might have sustained a several appeal. If that be so, it must be upon the ground that a tort charged as joint may be established by proof of its being committed by either party; and, in such case, that there may be a several decree of guilt as to one, and acquittal as to another. My opinion is, that there is no difference as to the right of appeal, whether the respondents sever or join in their answer or pleadings, if the defence is several in its nature, as a general denial of the matters alleged, in the nature of the general issue; for then there may be a several decree of guilt as to one, and of acquittal as to the other. It may be otherwise where there is a joint justification by the respondents; for then it is difficult to perceive how either can separately contest its proof or sufficiency. The more pressing diffi-

The practice of the courts is settled, where in prize cases an appeal is made and not prosecuted ; and doubtless the same rules would apply in other cases. That is, the appellate court may pronounce the appeal to be deserted, and may remit the cause to the court below for final proceedings, or may permit the party who has obtained the decree in the court below, to try or argue the case *ex parte*, and then affirm the decree if they see cause.<sup>1</sup> And

culty is, when there is a joint decree against all the defendants for damages in tort, whether one can appeal alone. There is a distinction well known at the common law, between suits founded on the joint contract of the parties defendant, and suits founded upon their tort. In the former, the contract must be proved to be joint, as it is charged; in the latter, it need not. Upon a joint justification in tort, a writ of error lies only by all the parties to the justification; for all are aggrieved if any are. But if they plead severally, and some are acquitted and the others are found guilty, the latter may maintain a writ of error alone, for they alone are aggrieved. . . . In short, the appeal must be joint when the interest is joint; and several where there are distinct and separate interests, represented by independent parties in the same suit.

"In cases of tort, it seems to me that the same rule must by analogy prevail, where the defendants have not a joint interest, and do not, by their pleading, assume a joint defence. In personal trespasses like the present, though the tort should be jointly charged, it is also several in its nature, and one defendant may be found guilty, and the other acquitted. It would seem strange, if the decree of the district court should pronounce for a joint trespass and give damages accordingly, that one party should not be entitled to an appeal unless the other would join in it; that one party should not be allowed to establish his innocence upon the appeal, because the other had, by his submission to the decree, admitted his own guilt. Each defendant, in such a case, has a distinct and several interest in the suit. He may answer severally, and a final decree may be entered in his favor. And if he denies the whole charge jointly with the other defendant, by a general answer in the nature of the general issue, he is not thereby deprived of this right to a separate acquittal, if the evidence warrants it. . . . However, if the decree were for joint damages against both defendants, I do not well see how the libellant could maintain a separate appeal against one, for that would be to claim several damages against each. But it would be different as to the defendants; for the charge being in its nature several, as well as joint, one might be aggrieved by the decree, when the other was not, and, therefore, might be entitled to a separate appeal. . . . My opinion is, that, in this case, a several appeal well lies by Thomas from the decree for joint damages, upon the ground that the asserted trespass is several as well as joint; and that Thomas has a distinct and independent interest and responsibility in the suit, unaffected by the decision as to Jordan."

<sup>1</sup> The Privateer *Montgomery v. Sch. Betsey*, 1 Gallis. 416. See *The Elizabeth*, 1 Hagg. Adm. 226; *The San Juan Nepomuceno*, id. 265, 267.

the appellate court may either tax the costs, or direct this to be done in the court below.<sup>1</sup>

Whenever an appeal case is heard and decided, and a mandate goes down to the court below to carry the decree into effect, there may be an appeal from that court on the execution of that mandate; because it is necessary that the appellate court should have the power of securing the due execution of its decree.<sup>2</sup> But on such appeal, nothing prior to the mandate comes before the appellate court as a question by itself. And, therefore, after a case is sent back to the circuit court, the objection cannot be taken on a second appeal that the court had no jurisdiction to entertain the appeal in the first instance from the circuit court, on the ground that the decree in that court was not a final one.<sup>3</sup> But all the prior proceedings, documents, and evidence, are in the hands of the appellate court, for the purpose of deciding accurately any questions which may arise subsequently to the mandate.<sup>4</sup> If there

<sup>1</sup> *The Privateer Montgomery v. Sch. Betsey*, 1 Gallis. 416.

<sup>2</sup> *Himely v. Rose*, 5 Cranch, 313; *Boyce v. Grundy*, 9 Pet. 275. In *Sibbald v. The United States*, 12 Pet. 488, 492, the court said: "The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. . . . If the special mandate is not obeyed or executed, then the general power given to 'all the courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law,' by the 14th section of the judiciary act, fairly arises, and a mandamus, or other appropriate writ will go." In *United States v. Fremont*, 18 How. 30, an appeal was dismissed on the ground that it was not entered in the Supreme Court in time, and also on the ground that as the inferior court having taken no action in the case, except to enter the mandate on its records, there was nothing to appeal from. In *Ex parte Dubuque* R. 1 Wallace, 69, it was held that the inferior court had no authority but to obey the mandate, and that it could not order a new trial, and that mandamus would lie from the appellate court. See *Milwaukie R. v. Soutter*, 2 Wallace, 510.

<sup>3</sup> *Washington Bridge Co. v. Stewart*, 3 How. 413; *Whyte v. Gibbes*, 20 How. 541.

<sup>4</sup> *The Santa Maria*, 10 Wheat. 431. A decree for general restitution of property had been made in this case. It appeared on the face of the proceedings that the property had been appraised at its value, including the duties to the United States by the claimant, and a stipulation for the amount given. It was

be a general decree of restitution in the Supreme Court of the United States, no party can set up new claims or new liens in the court below, even if they would have been allowed had they been asserted before the original decree.<sup>1</sup> So if interest be not mentioned in the decree, none will be allowed.<sup>2</sup>

If a bond be given in the district court conditional to pay or do a certain thing in case of condemnation in that court, and there be an appeal to the circuit court and condemnation there, it has the same effect to forfeit the bond.<sup>3</sup>

An appeal, as has been already stated, takes up the whole case, and it will be heard and decided by the appellate court on its merits. But it has been said that the appellate court is very unwilling to vary the decree of the lower court, in cases of salvage, when the question is merely one of amount or proportion; as it is deemed especially important that cases of this kind should be finally disposed of without delay, if it can be avoided.<sup>4</sup> Yet it is

held that the decree awarded only the value of the property to the libellant, and that the claimant was entitled to deduct the duties.

<sup>1</sup> *The Santa Maria*, 10 Wheat. 431.

<sup>2</sup> *Himely v. Rose*, 5 Cranch, 313. The decree of the Supreme Court in this case said nothing about interest. The property in dispute had been sold, and the court said: "If this money remains in possession of the court, it carries no interest; if it be in the hands of an individual, it may bear interest, or otherwise, as the court shall direct." See also *The Santa Maria*, 10 Wheat. 431; *Boyce v. Grundy*, 9 Pet. 275; *Hemmenway v. Fisher*, 20 How. 255; *The Ann Caroline*, 2 Wallace, 538, 550.

<sup>3</sup> *United States v. Four Part Pieces of Woollen Cloth*, 1 Paine, C. C. 435. See also *United States v. Schooner Little Charles*, 1 Brock. C. C. 380.

<sup>4</sup> *Tyson v. Pryor*, 1 Gallis. 188; *The Sybil*, 4 Wheat. 98. In *Hobart v. Drogan*, 10 Pet. 108, 119, *Story, J.*, said: "This court is not in the habit of revising" decrees of the court below "as to the amount of the salvage, unless upon some clear and palpable mistake or gross over-allowance of the court below. It is equally against sound policy and public convenience to encourage appeals of this sort in matters of discretion, unless there has been some violation of the just principles which ought to regulate the subject." In *Walsh v. Rogers*, 18 How. 284, which was a case of collision, *Grier, J.*, said: "In such cases the oral examination of witnesses before the court, with a stringent cross-examination by skilful counsel, is almost the only method of eliciting truth from such sources. This may be done in the district court, and sometimes, possibly, on appeal to the circuit court. But such a course of sifting out the truth in doubtful cases cannot be pursued here. We are disposed, therefore, to require that the appellant should be held to make out a pretty clear case of mistake in the court below, before he should expect a reversal of their judgment. Raising a doubt on contested facts, is not

obvious that where a party has a right of appeal given him by law, "he has a right to demand the conscientious judgment of the appellate court on every question arising in the cause," and so it was once held.<sup>1</sup> Later decisions have, however, practically made it useless to appeal on questions of fact to the Supreme Court of the United States, when both the district and circuit courts have agreed.<sup>2</sup> And on appeals from the district court to the circuit

sufficient for the action of this court. An appeal should not be a mere speculation on chances." See also *The Cuba*, Lush. Adm. 14. In *The Constitution*, Brow. & L. Adm. 324, the Privy Council said: "We must either affirm or alter a sentence on appeal, and those who call upon us to alter it, must impress us with a reasonable conviction that it is wrong."

<sup>1</sup> *Post v. Jones*, 19 How. 150, 160. See also *The Thetis*, 3 Hagg. Adm. 14, 2 Knapp, 390; *The Messenger*, Swabey, Adm. 191.

<sup>2</sup> In *Morewood v. Enequist*, 23 How. 491, 495, *Grier, J.*, said: "We have frequently said that appellants should not expect this court to reverse a decree of the circuit court merely upon a doubt created by conflicting testimony." In *The Marcellus*, 1 Black, 414, 417, the same learned judge said: "In this, as in all other cases of the kind, there is great discrepancy and conflict in the testimony of the witnesses, as to every averment in the pleadings. We have had occasion to remark more than once, that when both courts below have concurred in the decision of questions of fact under such circumstances, parties ought not to expect this court to reverse such a decree, merely by raising a doubt founded on the number and credibility of witnesses. The appellant in such case has all presumptions against him, and the burden of proof cast on him to prove affirmatively some mistake made by the judge below, in the law or in the evidence. It will not do to show that on one theory, supported by some witnesses, a different decree might have been rendered, provided there be sufficient evidence to be found on the record to establish the one that was rendered." In *The Water Witch*, 1 Black, 494, 500, the same learned judge said: "The weight of the testimony, as decided by the judges of both courts, inclined in favor of the libellant, and we see no reason to differ from them. The weight of testimony is not always with numbers, and this court should not have their time spent in hearing arguments whether the eleven deponents on one side ought to be believed rather than ten on the other. In such cases, the concurrent finding of two courts ought to satisfy the losing party." See also *Newell v. Norton*, 3 Wallace, 257, 268; *The Hypodame*, 6 id. 223. So in *Virden v. The Brig Caroline*, U. S. C. C. Del., 1857, 6 Am. Law Reg. 222, 228, *Taney, C. J.*, stated the law as follows: "It is, therefore, the practice of appellate courts, where its opinion approximates to the one entertained by the court below, not to disturb its judgment, although it may not fully concur in the propriety of the sum awarded. But where it is otherwise, it is undoubtedly the duty of the appellate tribunal to decide the case upon its own judgment as to the right and just claims of the parties." In *The Clarisse*, Swabey, Adm. 129, 134, a case of salvage, the Privy Council said: "It is a settled rule, and one of great utility, particularly with reference to cases of this description, that the difference ought to be

court, it has been held that where the evidence is nicely balanced and the case depends altogether upon the credibility of witnesses, the circuit court is not inclined to interfere with the decision below.<sup>1</sup>

Appeals must be from final decrees.<sup>2</sup> Some controversy has arisen as to what is a final decree, but the following points may now be considered as settled. A decree dismissing a libel *in rem* for want of prosecution is not a final decree.<sup>3</sup> If the court decree that the libellant is entitled to recover damages, and the cause is sent to an assessor to determine the amount, this decree is not final;<sup>4</sup> and, generally, if a case is sent to a master, the decree is not final.<sup>5</sup> And if the report of the master determining the amount is accepted by the court, and a decree passed that such an amount is due, but no order is made for the payment of the money because there are other cases against the vessel, and the amount in court may not be large enough to pay all, there is no final decree.<sup>6</sup>

So if the property libelled is ordered to be restored with costs and damages, no appeal lies until the amount of the damages is

very considerable to induce a court of appeal to interfere upon a question of mere discretion." See also *The Cuba*, Lush. Adm. 14.

<sup>1</sup> *The Sampson*, 4 Blatchf. C. C. 28; *The Florida*, id. 470.

<sup>2</sup> See *Canter v. American Ins. Co.* 3 Pet. 307, 317. Mr. Justice Story in this case said: "It is of great importance to the due administration of justice, and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments, upon successive appeals."

<sup>3</sup> *The Merchant*, 4 Blatchf. C. C. 105.

<sup>4</sup> *Chace v. Vasquez*, 11 Wheat. 429. In *Mordecai v. Lindsay*, 19 How. 199, the case was decided in favor of the libellants in the district court, and then ordered to be sent to an assessor to report the amount. Without further proceedings being had, the respondents appealed to the circuit court, where the case was heard on its merits, and the decree of the district court reversed. The libellants then appealed to the Supreme Court, where the counsel moved that they might be permitted to amend the record by consent, by inserting in it what might be agreed upon by them as a final decree. But the court held, that as the case never came properly before the circuit court, it could not come before the Supreme Court, and the case was sent back to the circuit court that the appeal might be dismissed by it for want of jurisdiction, leaving the parties to obtain the final decree in the district court.

<sup>5</sup> *Beebe v. Russell*, 19 How. 283; *Farrelly v. Woodfolk*, 19 How. 288; *Humiston v. Stainthorp*, 2 Wallace, 106.

<sup>6</sup> *Montgomery v. Anderson*, 21 How. 386.

ascertained.<sup>1</sup> The word "final" has been defined by the Supreme Court of the United States to apply to all judgments and decrees which determine the particular cause; and it is not necessary that the subject-matter in dispute should be finally decided. Thus, if after the decree is pronounced, merely ministerial duties are to be performed, as the sale of mortgaged property on a decree ordering a sale, the decree is considered as final.<sup>2</sup> So if the decree directs costs to be taxed.<sup>3</sup>

A decree in a cause of prize which disposes of the whole matter in controversy, upon a claim filed by particular parties, which is final as to them and their rights, and final also, so far as the claimants and their rights are concerned, as to the United States, and which awards execution against the claimants, is a final decree from which an appeal lies.<sup>4</sup>

A decree adjudging that the defendant pay a certain sum into court within a limited time, or in default thereof the court will appoint a receiver, is a final decree.<sup>5</sup> And if the jurisdiction of the inferior court is objected to, it would seem that the decision of the court upon this question would be a final decree which might be appealed from under the 25th section of the judiciary act.<sup>6</sup>

<sup>1</sup> The *Palmyra*, 10 Wheat. 502.

<sup>2</sup> *Ray v. Law*, 3 Cranch, 179.

<sup>3</sup> *Craig v. Steamer Hartford*, 1 McAll. C. C. 91.

<sup>4</sup> In *Withenbury v. United States*, 5 Wallace, 819, several libels were filed for the condemnation as prize of war of large quantities of cotton and other goods. On motion these libels were consolidated, and various claims were interposed in the consolidated suit for portions of the property libelled. Among others was that of *Withenbury*, who denied the validity of the capture and claimed a certain number of bales. Upon a hearing of the cause, an order was made dismissing the claim with costs, for which an execution was ordered. On appeal a motion was made to dismiss, on the ground that there had been no final decree, because no disposition had been made of the libel or of the cotton or its proceeds. The court held that the decree was final, *Clifford, J.*, dissenting.

<sup>5</sup> *Wabash Canal v. Beers*, 1 Black, 54.

<sup>6</sup> *Weston v. City Council of Charleston*, 2 Pet. 449, 464. This case was brought before the court on a writ of error, to the highest State court in South Carolina, under the 25th section of the judiciary act which provides "that a final judgment or decree in any suit in the highest court of law or equity of a State in which a decision in the suit could be had, . . . where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the constitution, treaties, or law of the United States, and the decision is in favor of such their validity, . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States." In the court of common

If the decree is rendered in respect to any subject which is merely within the discretion of the court, no appeal lies, as in respect to costs,<sup>1</sup> amendments,<sup>2</sup> a petition to open a decree,<sup>3</sup> to reinstate a cause which has been dismissed,<sup>4</sup> to grant a new trial,<sup>5</sup> or to dissolve an injunction, unless the bill has been finally disposed of.<sup>6</sup>

When an order is made which is intended merely to carry out a decree, this cannot be said to be a final decree from which an appeal lies, as an order of sale in execution of an original decree;<sup>7</sup> or an attachment against a party who refuses to obey a decree of the court.<sup>8</sup>

Where a provisional decree was entered for the libellant for \$4,000 and interest and costs, with liberty to either party, within twenty days, to take an order of reference to a commissioner to ascertain and report the amount due, and on the coming in of the report, either party to be at liberty to move the court to frame the decree in correspondence therewith, this was held not to be a final decree.<sup>9</sup>

In causes of seizure for the breach of the revenue laws, the right of appeal depends upon the value of the property at the time of seizure, and not on the net proceeds, after expenses, charges, duties, etc., are deducted.<sup>10</sup>

pleas it was decided that a certain ordinance of the city of Charleston was unconstitutional; but on application to the highest court in the State the decision was reversed, and the writ of error was then brought; and it was held that the decree was a final one, and that the writ of error would lie. See also *Holmes v. Jennison*, 14 Pet. 540.

<sup>1</sup> *Canter v. American Ins. Co.* 3 Pet. 307; *Harmony v. United States*, 2 How. 210; *United States v. Brig Malek Adhel*, 2 How. 210, 237.

<sup>2</sup> *Marine Ins. Co. of Alexandria v. Hodgson*, 6 Cranch, 206; *United States v. Buford*, 3 Pet. 12; *Walden v. Craig*, 9 Wheat. 576; *Chirac v. Reinicker*, 11 id. 280.

<sup>3</sup> *Brockett v. Brockett*, 2 How. 238.

<sup>4</sup> *Welsh v. Mandeville*, 7 Cranch, 152.

<sup>5</sup> See *Sparrow v. Strong*, 3 Wallace, 97.

<sup>6</sup> *McCullum v. Eager*, 2 How. 61; *Gibbons v. Ogden*, 6 Wheat. 448; *Verden v. Coleman*, 18 How. 86. See also, generally, *Smith v. Trabue*, 9 Pet. 4; *Boyle v. Zacharie*, 6 Pet. 648; *Toland v. Sprague*, 12 Pet. 300; *Evans v. Gee*, 14 Pet. 1; *Barton v. Forsyth*, 5 Wallace, 190.

<sup>7</sup> *Carr v. Hoxie*, 13 Pet. 460.

<sup>8</sup> *McMicken v. Perin*, 20 How. 133.

<sup>9</sup> *The Yuba*, 4 Blatchf. C. C. 314.

<sup>10</sup> *United States v. 84 Boxes of Sugar*, 7 Pet. 453.



## CHAPTER IV.

## OF JURISDICTION IN CASES OF SEIZURES.

THE district court is the primary court of revenue, having original jurisdiction in all cases of seizures under the statutes of the United States concerning imposts, navigation, or trade; it may try all questions and entertain all suits, either for the condemnation or acquittal of the property seized; and may decree restoration and compel delivery of the property or of its proceeds or value, into the possession of those whom it finds ultimately to be entitled thereto;<sup>1</sup> and may do this as well by summary decree or decretal order, if the case be already before the court, as upon original proceedings.

It does not derive its jurisdiction from any possession, actual or supposed, of its officers, but from the act and the place of the seizure for the forfeiture;<sup>2</sup> and if it once acquire jurisdiction, it seems that this is not avoided by any subsequent irregularity.<sup>3</sup>

<sup>1</sup> The Abby, 1 Mason, 360.

<sup>2</sup> The libel should, therefore, aver that the vessel has been seized in the district where suit is brought, and that the seizure still subsists. The Washington, 4 Blatchf. C. C. 101.

<sup>3</sup> The Bolina, 1 Gallis. 75. On p. 81, Story, J., said: "In the admiralty, in all proceedings *in rem*, the court has a right to order the thing to be taken into the custody of the law, and it is presumed to be in the custody of the law, unless the contrary appears; and when once a vessel is libelled, then she is considered as in the custody of the law, and at the disposal of the court; and monitions may be issued to persons having the actual custody, to obey the injunctions of the court. The jurisdiction of the admiralty, however, is not founded on that circumstance."

And on p. 83, "The district court of the United States derives its jurisdiction, not from any supposed possession of its officers, but from the act and place of seizure for the forfeiture. Act 24th September, 1789, c. 20. And when once it has acquired a regular jurisdiction, I do not perceive how any subsequent irregularity would avoid it. It may render the ultimate decree ineffectual in certain events, but the regular results of the adjudication must remain. I do not apprehend that an accidental destruction by fire would prevent the court from protecting its officers from prosecution by pronouncing, if just, a regular condemnation."

In the case of *Jennings v. Carson*, 4 Cranch, 2, the principles of admiralty law

The court of the district in which the seizure is first made (without regard to the place where the forfeiture occurs), has exclusive original cognizance of it;<sup>1</sup> and if the property be carried into another district, the circuit court will remand the property to the district in which it was originally seized.<sup>2</sup> But if the seizure be made upon the high seas,<sup>3</sup> or within the territory of a foreign power,<sup>4</sup> that court has cognizance of it, into which court, or the district of which court, it is finally carried. If the seizure is on land, the court proceeds as a court of common law, with a jury, and the general course of the English Exchequer upon informations *in rem* is followed.<sup>5</sup> ✓

These two jurisdictions, admiralty and common law, though vested in one court, are perfectly distinct and independent, and cannot be blended together.<sup>6</sup> But if the seizures be upon waters

as to the jurisdiction of the court over the property, were fully laid down by *Marshall, C. J.* The privateer *Addition*, cruising under a commission during the war with Great Britain, captured the Sloop *George* and libelled her in the court of admiralty for New Jersey, where she was condemned and decreed to be sold. The claimant, *Jennings*, appealed, and the decree was reversed by the circuit court. Pending the appeal the vessel was sold; and *Jennings* brought a suit against the captors as wrongdoers. The court held, that the moment a vessel was libelled, it was in the custody of the law, not of the captors, and that the court of admiralty, having possession of the property, had an undoubted right to sell it for the benefit of the parties. The law of these two points was ably examined under the principles then acknowledged (1807), and the conclusions there laid down appear to be now well settled.

In regard to the question of irregularity in the record and in the manner of sale, the court said, in *Jennings v. Carson*: "At any rate, the court of admiralty must be supposed to have done its duty, and to have been in possession of the thing in contest, if its duty required that possession. . . . The *George* and her cargo, therefore, must be considered as being in custody of the law, unless the contrary appears. If this conclusion be right, it follows that the regularity of the sale is a question of no importance to the defendants, since that sale was the act of a court having legal possession of the thing, and acting on its own authority."

<sup>1</sup> *Keene v. United States*, 5 Cranch, 304.

<sup>2</sup> *The Abby*, 1 Mason, 360, per *Story, J.*

<sup>3</sup> *The Abby*, 1 Mason, 360.

<sup>4</sup> *The Ship Richmond v. United States*, 9 Cranch, 102; *The Merino*, 9 Wheat. 391.

<sup>5</sup> *United States v. Fourteen Packages of Pins*, Gilpin, 235; 651 Chests of Tea *v. United States*, 1 Paine, C. C. 499, 504; *The Sarah*, 8 Wheat. 391.

<sup>6</sup> In *The Sarah*, 8 Wheat. 391, *Marshall, C. J.*, after stating the case, proceeded as follows: "By the act constituting the judicial system of the United

navigable from the sea by vessels of ten or more tons burden, this

States, the district courts are courts both of common law and admiralty jurisdiction. In the trial of all cases of seizure on land, the court sits as a court of common law. In cases of seizure made on waters navigable by vessels of ten tons burden and upwards, the court sits as a court of admiralty. In all cases at common law, the trial must be by jury. In cases of admiralty and maritime jurisdiction, it has been settled in the cases of *United States v. La Vengeance*, 3 Dall. 297; *United States v. Sch. Sally*, 2 Cranch, 406; and *United States v. The Betsey & Charlotte*, 4 Cranch, 443; that the trial is to be by the court. Although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals, and can no more be blended, than a court of chancery with a court of common law. The court for the Louisiana district was sitting as a court of admiralty; and when it was shown that the seizure was made on land, its jurisdiction ceased. The libel ought to have been dismissed, or amended by charging that the seizure was made on land. The direction of a jury in a case where the libel charged a seizure on water was irregular; and any proceeding of the court, as a court of admiralty, after the fact that the seizure was made on land appeared, would have been a proceeding without jurisdiction. The court felt some disposition to consider this empanelling of a jury at the instance of the claimants, as amounting to a consent that the libel should stand amended; but on reflection, that idea was rejected. If this is considered as a case at common law, it would be necessary to dismiss this appeal; because the judgment could not be brought before this court but by writ of error. If it is considered as a case of admiralty jurisdiction, the sentence ought to be reversed, because it could not be pronounced by a court of admiralty on a seizure made on land. As the libel charges a seizure on water, it is thought most advisable to reverse all the proceedings to the libel, and to remand the cause to the district court for further proceedings, with directions to permit the libel to be amended."

In 1828, the same case came on to be heard again, under the name of *United States v. 422 Casks of Wine*, 1 Pet. 547, judgment having been rendered in the court below in favor of the claimants. The appeal was made on the ground that the original claimants, Hazard & Williams, were not the real owners of the wine under seizure. The court held that it was too late for this ground to be taken, because it should have been taken before the trial in the court below. The court said: "The objection is founded upon a mistaken view of the time, nature, and order of the proceedings proper in suits *in rem* whether arising on the admiralty or exchequer side of the court. In such suits the claimant is an actor, and entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him a *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. He is, therefore, in the regular and proper course of practice, required, in the first instance, to put in his claim upon oath, averring in positive terms, his proprietary interest. If he refuses so to do, it is a sufficient reason for a rejection of his claim. If the claim be made through the intervention of an agent, the

court had admiralty jurisdiction by the statute by libel without jury.<sup>1</sup>

If the libel charge the seizure as having been made on the *water*, when in fact it was made on the *land*, it is bad, and must be either amended or dismissed.<sup>2</sup>

The district court has, however, no jurisdiction to enforce a lien for duties, by information in admiralty; because its revenue jurisdiction, by procedure *in rem*, extends only to seizures for *forfeitures* under the laws of impost, navigation, or trade. But an action at common law may be instituted by the United States and in their name, in the district or in the circuit court, to recover possession of goods if they have a legal lien on them, or to recover damages for the illegal taking or detaining them.<sup>3</sup>

agent is, in like manner, required to make oath to his belief of the verity of the claim, and, if necessary, he may also be required to produce and prove his authority, before he can be admitted to put in the claim. If this is not done, it furnishes matter of exception, and may be insisted upon by the adverse party, for the dismissal of the claim. If the claim be admitted upon this preliminary proof, it is still open to contestation, and, by a suitable exceptive allegation in the admiralty, or by a correspondent plea in the nature of a plea in abatement to the person of the claimant, in the exchequer, the facts of proprietary interest sufficient to support the claim may be put in contestation and formally decided. It is in this stage of the proceedings, and in this only, that the question of the claimant's right is generally open for discussion. If the claim is admitted without objection, and allegations or pleadings to the merits are subsequently put in, it is a waiver of the preliminary inquiry, and an admission that the party is rightly in court and capable of contesting the merits." But when, after the merits have been passed upon, it appears that the rights of some third person have been wrongfully invaded, it is a matter for the consideration of the court, but, in no shape, a matter which the original *promovent* could require at its hands.

<sup>1</sup> The Margaret, 9 Wheat. 421.

<sup>2</sup> The Sarah, 8 Wheat. 391.

<sup>3</sup> United States v. 350 Chests of Tea, 12 Wheat. 486. In this case, a libel was filed against 350 chests of tea, for the purpose of compelling the payment of the duties thereon. The teas had been landed and stored, and fraudulently and secretly taken from the store-house. The court decided that the duties having been "secured to be paid," according to the statute, they were not now due, and proceeded, p. 497, "By the 9th section of the judiciary act, the district courts have exclusive original cognizance," etc. (giving the substance of the section). "Now it is not pretended that this is a civil cause of admiralty and maritime jurisdiction; and it has already been shown that there is no law of the United States, of impost or otherwise, to warrant the seizure of the teas in question, or to subject them to forfeiture. But even if there were such a law, the only proceed-

ing which could have been instituted under it must have been to forfeit the articles seized, and not to subject them to the payment of duties. If the case be not one of forfeiture, we can perceive no ground upon which the district court could entertain a suit by way of libel to enforce the payment of duties. No jurisdiction is conferred upon that court in such a case, either by the above section of the judiciary act, or by any other act of Congress. There is no doubt but that a suit at common law might be instituted in that court as well as in the circuit court, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or damages for the illegal taking or detaining of the same. But the remedy which has been selected is not one which can obtain the sanction of this court."

## CHAPTER V.

## OF SUITS BY FOREIGNERS IN ADMIRALTY.

THE general subject of admiralty jurisdiction is commerce ; for even its revenue and its military jurisdiction relate mainly to commercial matters. These are at home on the ocean, and as they make it a highway from country to country, instead of a barrier between them, they may be said to connect nations into some measure of fellowship and unity ; and this, it may be believed, will grow with the advancing civilization of mankind. It might, therefore, be expected that courts which deal with these subjects of universal interest should not only be governed by similar principles in different nations, and adopt similar forms, but that they should exercise a kind of common jurisdiction. They sometimes enforce each other's decrees, or complete in one country what is done in another. And frequently the citizens of one nation sue in the admiralty courts of another, and when comity demands it, their petitions will be heard and their causes determined. ✓

In England, in an early case on this subject, an American vessel which had been captured was recaptured by her crew and taken to England. Some of the crew who were English subjects, and had shipped on the voyage to England with no intention of returning to America, libelled the ship for salvage, and the court entertained jurisdiction of the case. And subsequently four American seamen petitioned for reward for their services in the rescue, and it was allowed them.<sup>1</sup>

In all matters which properly belong to the *jus gentium*, and where justice requires that the court should act, it will do so ; as in case of bottomry bonds.<sup>2</sup> In respect to seamen's wages, as a

<sup>1</sup> The Two Friends, 1 Rob. Adm. 271, 276. See also The Good Intent, cited 1 Rob. Adm. 286, where an American vessel was recaptured from the French by an American armed ship, and there being no opposition to the jurisdiction of the court, salvage was allowed.

<sup>2</sup> The Gratitude, 3 Rob. Adm. 240 ; The Jacob, 4 id. 245 ; The Madonna D'Ibra, 1 Dods. 37.

general rule the court will take jurisdiction, if the suit is commenced with the consent of the representative of the country to which the ship belongs.<sup>1</sup> And in some cases where this consent cannot be obtained, the court will proceed without it.<sup>2</sup> It seems, however, that the consent of the foreign minister is essential, not in respect to the jurisdiction of the court, but merely as to the exercise of its discretion.<sup>3</sup> The court is unwilling to enforce a mere municipal law of a foreign country, although it has jurisdiction of the subject-matter.<sup>4</sup> It is for this reason, that the court will not

<sup>1</sup> *The Courtney*, Edw. Adm. 239; *The Madonna D'Ibra*, 1 Doda. 37.

<sup>2</sup> *The Vrow Mina*, 1 Doda. 234. In this case, a ship which belonged to an alien enemy, came to England under a British license, and was libelled for wages. The court entertained the suit, and stated that as the consent of the accredited minister could not be obtained, it would not be required. The same point was decided in *The Maria Theresa*, 1 Doda. 303, and the further reason was added, that the courts of the country to which the ship belonged would not grant relief on account of the illegality of the voyage.

<sup>3</sup> *The Golubchick*, 1 W. Rob. 143. The vessel in this case belonged to Russia, and was libelled for wages. The master appeared under protest, stating that the suit had been commenced without the consent of the Russian consul, or any other accredited agent of that government in the country. Dr. *Lushington* held, that "the court must possess original jurisdiction over the subject-matter, or it can have none at all; for the consent of a foreign consul or minister never could confer a jurisdiction upon a British court of judicature." The learned judge, however, said that he wished "it to be understood, that in all future cases of this kind, it must be held to be indispensable, that notice of the intended proceedings should be given, in the first instance, to the representative of the foreign government. In so directing, I do not mean to intimate that the court would feel imperatively bound to act in accordance with the views that might be entertained by such representative; but I consider it is expedient that such intimation should be given, in order that, if any objection should be taken against the prosecution of the proceedings in this court, the court being informed of the grounds upon which such objection is taken, might be enabled to form its own judgment of the sufficiency of such objection, and adopt such a course as may be most conducive to the furtherance of justice in the cause." See also *The Milford*, Swabey, Adm. 366; *The Herzogin Marie*, Lush. Adm. 292; *The Octavia*, Brow. & L. Adm. 215; *The Nina*, Law Rep. 2 Adm. 44.

<sup>4</sup> *The Courtney*, Edw. Adm. 239. In this case, the statute of the United States was printed on the back of the shipping articles, requiring the master, in case of the discharge of the seamen in a foreign port, to pay to the American consul three months' wages over and above their wages then due, two thirds of which were to go to the seamen and one third to the treasury of the United States. The court entertained the suit for wages under the shipping articles, but refused to enforce the provisions of this statute. In *The Madonna D'Ibra*, 1 Doda.

generally take jurisdiction of possessory suits between foreigners.<sup>1</sup> Nor will it entertain a suit by a British part-owner in a foreign ship to arrest her until bail is given for her safe return to her home port.<sup>2</sup>

Stipulations in the shipping articles, that no suit should be

37, a claim was made by some Greek sailors who had shipped at Smyrna for London, for their wages, and also for an allowance for their subsistence until they could return to their country. There was evidence that, by the customary regulations of Turkey, it was the duty of a master to take his crew back in his own vessel, or to find conveyance for them in another vessel, and that, in case of the sale, the proceeds were liable for the support of the crew, and to procure them the means of conveyance to their own country. A sufficient sum for the subsistence of the crew was accordingly allowed, in addition to their wages. The court, after referring to the custom above cited, said: "This, I think, effectually distinguishes the present case from the American cases which were lately before the court. The American seamen did not there attempt to establish their right, as due to them by the universal usage and custom of their country, or as forming part of the contract under which they sailed, but upon the ground of a statute lately introduced. As the demand was made upon a mere legislative act of that country, the court declined to interfere, but it held there, that if the subject-matter in dispute between the parties had formed part of the contract, it would have upheld the demand."

<sup>1</sup> The *Johan & Seigmund*, Edw. Adm. 242. The vessel in this case belonged to Hamburg. The suit was brought by the owners of fifteen sixteenths to recover possession of the vessel from the master, who owned one sixteenth. Sir *William Scott* said: "The court, with the consent of the parties and of the accredited agent of the country to which they belong, certainly does hold plea of causes between foreigners, arising on the *jus gentium*; but this, I think, is a case which cannot be so considered, because, whatever may have been the general rule under the old civil law in cases of possession, it has been variously modified by the municipal law of different countries; and, therefore, by entertaining this suit I might deprive the parties of those rights to which they are entitled by the law of their own country, as administered in those courts to which they are directly and properly amenable." See also *The Martin of Norfolk*, 4 Rob. Adm. 293. In *The See Renter*, 1 Dods. 22, the same learned judge said: "The court, therefore, is very unwilling to enter upon such questions; and has never, I believe, entertained suits of this kind, unless the cases have been referred to its decision by the consent of parties, or by the intervention of the representative of the foreign state devolving the jurisdiction of his own country on this court." In this case, however, there being an order of the court exercising admiralty powers in the country to which the ship belonged, decreeing that the master should give up the vessel, the court enforced the decree.

<sup>2</sup> In *The Graff Arthur Bernstorff*, 2 Spinks, Adm. 30, Dr. *Lushington* intimated that he would entertain jurisdiction if it appeared that the part-owner had such a remedy by the law of the country to which the ship belonged.



brought, except in the port of the country to which the ship belonged, would undoubtedly be enforced in England, but the admiralty court would take jurisdiction if the voyage were broken up and abandoned in England.<sup>1</sup>

It is, however, in the judicial discretion of the court to import the law of a foreign country into its proceedings, and it sometimes declines to do so, if such an adoption would work injustice to others.<sup>2</sup> Whether freight is liable to a master for his wages is a question of remedy and not of contract, and depends, therefore, on the *lex fori*.<sup>3</sup>

In this country, it seems to be settled, after some controversy, that our admiralty courts have full jurisdiction over suits between foreigners, if the subject-matter of the controversy is of a maritime nature. It is, however, a question of discretion in every case, and the court will not take cognizance of the cause, if justice would be as well done by remitting the parties to their home forum. In one of the most elaborately considered cases on this subject, jurisdiction was exercised in the case of a bottomry bond, although the contract was made between subjects of the Sublime Porte, and it did not appear that it was intended that the vessel should come to the United States.<sup>4</sup> Claims for salvage, which depend for their determination upon the law of nations, will generally be considered by our courts.<sup>5</sup> It is, however, in cases of seamen's wages

<sup>1</sup> The Wilhelm Frederick, 1 Hagg. Adm. 138. The same rule has been adopted by the common-law courts, where the seaman is wrongfully discharged in a foreign country, *Sigard v. Roberts*, 3 Esp. 71; or compelled by cruelty to leave the vessel, *Limland v. Stephens*, 3 Esp. 269.

<sup>2</sup> The Johannes Christoph, 2 Spinks, Adm. 93.

<sup>3</sup> The Milford, Swabey, Adm. 362.

<sup>4</sup> The Jerusalem, 2 Gallis. 191. See also *The Aurora*, 1 Wheat. 96.

<sup>5</sup> *The Bee, Ware*, 332. In the case of *One Hundred and Ninety-four Shawls*, Abbott, Adm. 317, which was a case of salvage of English goods by an English ship, Judge *Betts* held, that although the court had jurisdiction, yet that the exercise of a sound discretion required him to dismiss the prosecution and to remit the property and cause to the proper forum in Great Britain. The learned judge stated that when the only question was as to the rate of reward, the court would be solicitous to give every practicable despatch to the suit. The reasons for dismissing the suit were, that the owner, in his answer, charged embezzlement and spoliation of the property; that the provisions of the English statute relating to salvage could be best adjudicated upon in England; that the vessel in which the goods originally were, had been the subject of salvage and had been taken to

that the power of the courts is most frequently invoked, and it is well settled that cognizance of a suit will be taken whenever justice demands that it should be done;<sup>1</sup> as where the voyage is broken up at a port of this country,<sup>2</sup> or the seaman is compelled

England by other salvors, and that all the questions relative to the salvage service could be best determined together; that the vessel to which the salvors belonged, was on a voyage to England at the time the service was rendered; and that the articles saved were especially adapted to the English market, and were transhipped from a vessel bound to London and near that port, and the court doubted whether such conduct, if excusable in law, gave a claim to remuneration as for a meritorious salvage.

<sup>1</sup> *The Ada*, Daveis, 407. The law on this subject is ably stated in the celebrated case of *Taylor v. Carryl*, 20 How. 583, 611, by the learned chief justice of the Supreme Court of the United States: "It is true, that it is not in every case obligatory upon our courts of admiralty to enforce it in the case of foreign ships, and the right or duty of doing so, is sometimes regulated with particular nations by treaty. But as a general rule, where there is no treaty regulation, and no law of Congress to the contrary, the admiralty courts have always enforced the lien, where it was given by the State or nation to which the vessel belonged. In this respect, the admiralty courts act as international courts, and enforce the lien upon principles of comity. There may be, and sometimes have been, cases in which the court, under special circumstances, has refused to interfere between the foreign seamen and ship-owner; but that is always a question of sound judicial discretion, and does not affect the jurisdiction of the court." It should be remarked, that although this citation is taken from a dissenting opinion, yet the decision of the court proceeded on another ground, and this doctrine was not doubted.

In *Ellison v. Ship Bellona*, Bee, 112, the court said: "Courts of admiralty have a general jurisdiction in causes, civil and maritime. . . . The case of seamen's wages comes within the description of causes; and this jurisdiction has been uniformly exercised by me, as regards foreigners generally." In this case, the court took jurisdiction in a suit for wages against a foreign vessel having letters of marque. It was, however, said that no action could be brought in a foreign country against a ship of war, because the seamen look to the government of the country by whom they are employed. Nor, it is said, would an action lie against a privateer, because the share of prize is settled between the owners and crew, and before the seamen are entitled to any prize money, the validity of the prize must be determined by the proper courts of the nation to which the captors belong.

<sup>2</sup> In *The Gazelle*, 1 Sprague, 378, in *The Barque Havana*, 1 Sprague, 402, and in *Peake v. Bark Havana*, November, 1857, all in the district court for the Massachusetts district, Judge *Sprague* held, that where a foreign vessel was attached and sold by State process for an ordinary debt of the owners, and the voyage was thus broken up, the seamen might sue in admiralty for their wages.

to desert on account of cruel treatment,<sup>1</sup> or is entitled to be discharged on account of a deviation.<sup>2</sup>

It seems to be questioned, whether a foreign seaman is entitled to sue in this country, if discharged here by his own wish, or with his consent.<sup>3</sup> But it is very clear that he is not, if he leaves the vessel of his own accord before the voyage is finished, and when he could return to his own country.<sup>4</sup> And our courts, if necessary, will enforce the provisions of a foreign statute,<sup>5</sup> though, if possible, they prefer in such a case to remit the parties to their home forum.<sup>6</sup> The same rule prevails in this country as in Eng-

<sup>1</sup> *Weiberg v. Brig St. Oloff*, 2 Pet. Adm. 428.

<sup>2</sup> *Weiberg v. Brig St. Oloff*, 2 Pet. Adm. 428. There was also cruel treatment in this case. The same point, as to the question of the effect of a deviation, was decided in the case of *Moran v. Baudin*, 2 Pet. Adm. 415. But in *Bucker v. Klorkgeter*, Abbott, Adm. 402, 409, there is a *dictum* of Judge *Betts*, that he would not take cognizance of a case where the seaman claimed his discharge solely on the ground of a deviation. In *Jansen v. The Heinrich*, Crabbe, 226, where the seamen were held entitled to leave the vessel, because they had not signed shipping articles, no question was made as to the jurisdiction of the court.

<sup>3</sup> It was held in *The Infanta*, Abbott, Adm. 263, that the court would not take jurisdiction in such a case. See also *Graham v. Hoskins*, Olcott, Adm. 224. In *The Brig Napoleon*, Olcott, Adm. 208, the libellant was an American citizen, and the case is not, therefore, contrary to those above cited, though the language of the court appears to conflict. But in *Johnson v. Dalton*, 1 Cow. 543, the supreme court of New York took cognizance of a marine tort, on the sole ground that the libellant had been legally discharged, though the voyage was not ended. And in *Pugh v. Gillam*, 1 Calif. 485, where the plaintiff, a British subject, shipped on time and was discharged by the master, seven days before the time expired, because the vessel was about to sail on a long voyage, it was held that he could sue in our courts, though the vessel and captain were English.

<sup>4</sup> *Gonzales v. Minor*, 2 Wallace, C. C. 348; *Thomson v. Ship Nanny*, Bee, 217; *Willendson v. The Försöket*, 1 Pet. Adm. 197; *Henry v. Curry*, Abbott, Adm. 433; *The Pacific*, Blatchf. & H. Adm. 187. In *Gardner v. Thomas*, 14 Johns. 134, the Supreme Court refused to entertain a suit, where it did not appear but that the parties intended to return to their own country at the termination of the voyage. In *Lynch v. Crowder*, U. S. D. C. New York, 12 Law Rep. 355, the seamen shipped in England to a port in this country, and thence to a port of discharge in the United Kingdom. The master assented to their leaving in this country, but afterwards withdrew his consent, and the dissent of the British consul to the suit was also filed. Under these circumstances, Judge *Betts* refused to allow the case to proceed, but held that as the master had given his unreserved consent to their discharge, and there was no proof that he had withdrawn it before costs were incurred, the respondents should pay summary costs.

<sup>5</sup> See *ante*, p. 172, n. 6.

<sup>6</sup> *One Hundred and Ninety-four Shawls*, Abbott, Adm. 317.

land, respecting stipulations in the shipping articles preventing the seamen from suing save in the home port. They have no application, if the voyage is broken up in a foreign country.<sup>1</sup> Our courts, it would seem, go somewhat farther than the English courts in requiring the assent of the minister or consul of the foreign country to which the parties belong;<sup>2</sup> and some recognition on his part of the court is usually required. His assent cannot have anything to do with the question of jurisdiction, for the reasons that we have already stated, but it becomes essential in another point of view. For the court is not obliged to take

<sup>1</sup> *Bucker v. Klorkgeter*, Abbott, Adm. 402. The case of *Aertson v. Ship Aurora, Bee*, 161, which is sometimes cited to the point that the court will in no case interfere where the shipping articles stipulate that all disputes shall be regulated according to the law of the country to which the vessel belongs, was decided on the ground that the libellant had made out no case for relief.

<sup>2</sup> In *Davis v. Leslie*, Abbott, Adm. 123, 134, after stating the English rule, Judge *Betts* said: "But in the courts of the United States, this precautionary condition is not required; and jurisdiction will ordinarily be exercised, if the voyage has been terminated by full completion or abandonment, or if the contract of hiring is dissolved by the wrongful act of the owner or master." But in *The Infanta*, decided in April of the same year, Abbott, Adm. 263, 268, the same learned judge said: "It is expected that a foreign seamen seeking to prosecute an action of this description in the courts of this country, will procure the official sanction of the commercial or political representative of the country to which he belongs; or that good reason will be shown for allowing his suit, in the absence of such approval." The language of Mr. Justice *Grier*, in *Gonzales v. Minor*, 2 Wallace, C. C. 348, is much to the same effect. Without deciding whether the court would hear any case which was prosecuted without the consent of the consul, the learned judge said: "But when the court *does* entertain such cases without the request of the representative of the government, they will require the libellants to exhibit such a case of peculiar hardship, injustice, or injury, likely to be suffered without such interference, as would raise the presumption of a request, because it is in fact conferring a favor on such foreign state." And in *Hay v. Brig Bloomer*, U. S. D. C. Mass., March, 1859, *Sprague, J.*, said: "The usual course in the case of a libel by a foreign seaman against his vessel, is to direct the clerk to inform the consul of the government of the pendency of the suit, that he may take such notice of it as he thinks proper; and, unless there were strong circumstances in the case, the court would not proceed *in rem* against a foreign vessel, without the assent of the commercial representative here of the foreign government of the country where she belonged." See also *Lynch v. Crowder*, U. S. D. C. New York, 12 Law Rep. 355. In *The Barque Havana*, 1 *Sprague*, 402, as the accounts depended somewhat upon English law and usages, the aid of the British consul, as assessor, was invoked.

jurisdiction in any suit between foreigners, and does so for one of two reasons, either to protect its own citizens, as where foreigners are discharged upon our shores, or on account of the comity of nations. In this latter case, the consent of the accredited minister of the foreign country is of importance. If he expressly signifies his dissent, this is equivalent to an avowal on the part of the foreign government that they have no desire that our courts should exercise jurisdiction, and of course, no principles of comity require it. And a statute expressly providing that, except in certain cases, seamen shall not sue in a foreign country, would have the same effect.<sup>1</sup>

In one case, the libellant, an American citizen, had been hired in Boston for a voyage in an English registered vessel with an English master, from Boston to St. Jago and back to a port in the United States. The voyage was performed and the crew discharged in Boston. An action was commenced in a cause of personal damage, and the English consul filed a protest to the jurisdiction of the court, setting forth that the vessel was a British vessel, and the commander a British subject. Also, "that an investigation of some of the alleged causes of damage must call in question official acts and conduct of a British functionary in regard to British subjects, for which he is responsible only to his own government." Mr. Justice Curtis overruled the protest, and, on the merits, affirmed a decree in favor of the libellant.<sup>2</sup>

Jurisdiction has also been sustained of a suit brought by an alien against the consul of his nation, who was also an alien, and who resided in the district, to recover the amount of official fees improperly exacted.<sup>3</sup>

<sup>1</sup> *Hay v. Brig Bloomer*, U. S. D. C. Mass., March, 1859. The court seem to rely in this case on the statutes of the 7th & 8th Victoria, c. 112, in 1844, and the 13th & 14th Victoria, c. 93, § 94, in 1850. No notice seems to have been taken of the 17th & 18th Victoria, c. 104, § 190. But see *Roberts v. Knights*, 7 Allen, 449.

<sup>2</sup> *Patch v. Marshall*, 1 Curtis, C. C. 452.

<sup>3</sup> *Lowry v. Lousada*, U. S. D. C. Mass., *Lowell*, J., 1 Am. Law Review, 92.

## CHAPTER VI.

## OF THE JURISDICTION OF THE ADMIRALTY OVER PROCEEDS IN THE REGISTRY.

WHEN a vessel or other property against which a suit is brought is sold, and the proceeds brought into the registry, the power of the court to distribute these proceeds is unquestioned, but the right of the court to decree that third persons, who could not have proceeded against the property *in rem*, may receive a proportion of the proceeds of that property to satisfy their claims against the owner, does not seem to us to be clearly settled on principle, if it is on authority, and the growth of the power of the admiralty courts, in this particular, is to be attributed to a desire, on their part, to mitigate the hardships imposed on material men by the jealousy of the common-law courts.

Thus in England, prior to the passage of a late statute, material men could not enforce their lien against the vessel in admiralty; but at one time they were permitted to receive on their petition the amount due to them from the surplus proceeds in the registry.<sup>1</sup> The power of the court to decree payment out of the proceeds in such a case, when the payment was opposed by the owners, was soon afterwards denied.<sup>2</sup> And although the authority of this case was denied and the old rule maintained by Sir John Nicholl, a short time afterwards,<sup>3</sup> yet his decision was reversed by the Privy Council, on the ground that there was no difference between the right

<sup>1</sup> See cases cited 3 Hagg. Adm. 148, note. In most, if not in all of these cases, however, no appearance was made in behalf of the owners. In *The John*, 3 Rob. Adm. 288, the court decreed, in the case of a foreign ship, that a material man might have payment of the proceeds in the registry, but denied the right to a general creditor of the owners, on the ground that the nature of the accounts rendered his demand more fit for a court of chancery. The court said: "The court of admiralty would not attempt to interfere, where the demand itself is the subject of a dispute which the powers of a court of equity are alone competent to settle.

<sup>2</sup> *The Maitland*, 2 Hagg. Adm. 253.

<sup>3</sup> *The Neptune*, 3 Hagg. Adm. 129.

of action against proceeds, and that against the thing itself, where the claim is opposed by the owner, or by a person claiming under him, as a mortgagee in possession.<sup>1</sup> And a mortgagee, not in possession, has also been denied a share of the proceeds.<sup>2</sup> But where a vessel, which had been seized by the sheriff on execution, was taken by the officers of the court of admiralty, and sold by order of that court, and the sheriff petitioned that the balance of the proceeds after the judgment in the admiralty court had been satisfied, should be paid over to him, the Privy Council, on appeal, decreed that it should be done in preference to paying the balance to the owner.<sup>3</sup>

The power of the admiralty court to adjudicate between rival claimants to the balance of proceeds in the registry after satisfying liens, has been asserted in England by the House of Lords in a well-considered opinion.<sup>4</sup>

In this country a liberal policy has been pursued, and the general principle has been laid down, that where proceeds are rightfully in the possession and custody of the admiralty, "it is an inherent incident to the jurisdiction of that court to entertain supplemental suits by the parties in interest, to ascertain to whom those proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof."<sup>5</sup> It is not,

<sup>1</sup> *The Neptune*, 3 Knapp, P. C. 84. This decision was followed in the case of *The New Eagle*, 2 W. Rob. 441, where the court refused the petition of one who alleged that he had advanced a sum of money for the service of the vessel in the payment of seamen's wages, etc., and ordered the proceeds to be paid to the mortgagees. Dr. *Lushington*, referring to the case of *The Neptune*, said: "After that decision, it is impossible to make a distinction between the proceeds and the ship itself."

<sup>2</sup> *The Portsea*, 2 Hagg. Adm. 84; *The Exmouth*, id. 88, note.

<sup>3</sup> *The Flora*, 1 Hagg. Adm. 298. This case is generally cited as an authority to the point, that a judgment debt in a common-law court may be proved against the proceeds in admiralty. And the authority for this inference is the remark of the court that, "although the court of admiralty cannot enter into the contracts of general creditors, yet it may be bound to take a judgment on record as a debt." The decision seems, however, to have rested mainly on the ground that the right of the sheriff against the proceeds, on an attachment, was not lost by a sale under the admiralty court, its judgment being satisfied.

<sup>4</sup> *Place v. Potts*, 5 H. L. Cas. 383, affirming the decision of the Exchequer Chamber, 10 Exch. 370, which affirmed the decision of the Court of Exchequer, 8 Exch. 705. See also *The Dowthorpe*, 2 W. Rob. 73.

<sup>5</sup> *Andrews v. Wall*, 3 How. 568, 573, per *Story*, J.

however, to be understood that in this country the general creditors of the owner may, by petition, claim the proceeds in the registry, but the right is limited generally, at least, to those whose debt "is either of itself or in its origin a lien on the ship, or other thing out of which the moneys were produced."<sup>1</sup>

Where the lien is waived by intendment of law,<sup>2</sup> or is lost by a neglect to enforce it within the proper time,<sup>3</sup> it has been held that the claim may be enforced against the proceeds. But some courts have gone further, and it has been held that after the liens are all satisfied out of the proceeds of the sale, the surplus funds remaining in court are subject as against the owner to the claim of the master, although he can only sue *in personam* for wages.<sup>4</sup> And in another case, a stevedore, who, we have seen, cannot sue either *in personam* or *in rem*,<sup>5</sup> was allowed to have his claim paid out of the proceeds after all other claims were satisfied.<sup>6</sup> It has also been held that the admiralty will take jurisdiction in matters of account between part-owners in respect to the surplus proceeds;<sup>7</sup> but this doctrine, we think, is not supported on principle or on authority.

No distinction seems to be made in this country between the right of a mortgagee in possession and one who is out of possession, but the proceeds are given to either in preference to the owner or a general creditor, on the ground that the mortgagee has a lien at law.<sup>8</sup>

<sup>1</sup> *Gardner v. The Ship New Jersey*, 1 Pet. Adm. 223, 226.

<sup>2</sup> *Zane v. The Brig President*, 4 Wash. C. C. 453. See also *The Boston*, Blatchf. & H. Adm. 309, 328.

<sup>3</sup> *The Stephen Allen*, Blatchf. & H. Adm. 175.

<sup>4</sup> *The Santa Anna*, Blatchf. & H. Adm. 79.

<sup>5</sup> See *ante*, p. 189, n. 5, 6.

<sup>6</sup> *Emerson v. Proceeds of The Pandora*, 1 Newb. Adm. 438. But in the case of *The Ship Panama*, Olcott, Adm. 343, where the owner of the vessel claimed the right to the proceeds against the mortgagee and had paid the claim of a stevedore, it was held that he could not deduct the amount from the proceeds due the mortgagee.

<sup>7</sup> *The L. B. Goldsmith*, 1 Newb. Adm. 123.

<sup>8</sup> *Harper v. The New Brig, Gilpin*, 536; *Leland v. Ship Medora*, 2 Woodb. & M. 92; *The Ship Panama*, Olcott, Adm. 343; *Remnants in Court*, id. 382. The right of a lien creditor is, however, preferred to that of a mortgagee. *Justi Pon v. The Proceeds of the Brig Arbustci*, U. S. D. C. New York, 6 Am. Law Reg. 511.



A surety on a bond or stipulation in admiralty, who has paid the money in accordance with the decree of the court, stands in the place of the original debtor, and is entitled to the proceeds after the claims for which the vessel was libelled are paid. But his right is no greater than that of the original debtor, and his claim to the proceeds is postponed to creditors who have liens on the property.<sup>1</sup>

Where there are several suits against the proceeds, and the amount in the registry is not sufficient to pay them all, they will be paid according to their precedence. Thus a claim for seamen's wages is generally paid first, a bottomry bond next, and the claim of a material man next. Where there are several claims filed by material men, and one of them has obtained a decree of the court in his favor, he will be paid in priority to the others, and the others will share ratably.<sup>2</sup> So where a collision takes place, and one of the parties injured institutes proceedings against the vessel in fault, and at his own expense prosecutes his suit to a decree in his favor, another party injured by the collision, who has taken no part in the litigation, except to file a libel before the decree was rendered in the first case, cannot share in the proceeds of the vessel until the claim of the first party is satisfied in full.<sup>3</sup> If the different demands are of the same nature, priority in beginning the suit will not give priority in payment, if the other demands are brought to the attention of the court before a decree in the suit first brought is rendered.<sup>4</sup> The possessory lien of a shipwright is subject to maritime liens attaching to the ship when taken into the shipwright's yard, as salvage and mariner's wages then due; but is entitled to preference over claims for wages earned, or necessities furnished subsequently.<sup>5</sup> In England, the master has a lien for wages, but he cannot, if he binds himself formally in the terms of a bottomry bond, enforce this lien against the claim of the bondholder;<sup>6</sup> but if he is not personally liable on the bond, his claim,

<sup>1</sup> *Carrol v. The T. P. Leathers*, 1 Newb. Adm. 432.

<sup>2</sup> *The Wm. F. Safford*, Lush. Adm. 69.

<sup>3</sup> *Woodworth v. Insurance Co.* 5 Wallace, 87. See also *The Clara*, Swabey, Adm. 1; *Bernard v. Hyne*, 6 Moore, P. C. 56.

<sup>4</sup> *The Desdemona*, Swabey, Adm. 158.

<sup>5</sup> *The Gustaf*, Lush. Adm. 506.

<sup>6</sup> *The Jonathan Goodhue*, Swabey, Adm. 524.

though postponed to that of the seamen for their wages, is preferred to that of the bondholder.<sup>1</sup> And even where the master is formally bound, if the bottomry bond is on ship, freight, and cargo, his claim will be satisfied first, if the bond would exhaust the ship and freight, but ship, freight, and cargo are sufficient to satisfy the claims of both the master and bondholder.<sup>2</sup>

The possessory lien of the master of a vessel for freight and general average, earned and incurred subsequently to the giving of a bottomry bond, is entitled to precedence over a bottomry bond.<sup>3</sup>

The proceeds in the registry of an admiralty court cannot be attached by process of foreign attachment issuing from a common-law court.<sup>4</sup>

And where a sum of money in court has been decreed to be paid to a libellant, the court will not, on application of a creditor, appropriate it to a debt due by the libellant.<sup>5</sup> And if the vessel is bailed in one action, and arrested and sold in another, and the proceeds paid into the registry, the court will not apply the balance remaining, after satisfying the decree in the second suit, to payment of any excess of the decree in the first over the amount of bail, but will pay the balance to the owners of the vessel sued.<sup>6</sup>

<sup>1</sup> The *Salacia*, Lush. Adm. 545.

<sup>2</sup> The *Edward Oliver*, Law Rep. 1 Adm. 379.

<sup>3</sup> *Cargo ex Galum*, Brow. & L. Adm. 169.

<sup>4</sup> The *Albert Crosby*, Lush. Adm. 101. Dr. *Lushington* said: "I should certainly interfere by attaching any person who meddled with my registrar."

<sup>5</sup> *Brackett v. The Hercules*, Gilpin, 184.

<sup>6</sup> The *Wild Ranger*, Brow. & L. Adm. 84.

## CHAPTER VII.

## OF THE PRINCIPLES OF ADMIRALTY JURISPRUDENCE.

WE shall endeavor to treat of these in connection with the several topics which we have before enumerated. We divided them into three classes; the first of which consisted of those suits in admiralty which arise from private and civil claims, grounded on maritime contracts, either express or implied, or on maritime torts or trespass. The list of these is long; because it enumerates nearly or quite all the topics which are embraced in the law of shipping. In treating of that subject, we were sometimes obliged to state by anticipation the principles of admiralty jurisprudence; and as the admiralty court takes cognizance in this country of nearly all the cases or questions which can arise under the law of shipping, and in the far greater number of instances applies the same principles as the common-law courts, we have necessarily exhibited these principles in treating of that topic. What we purpose to do now, therefore, is to state what is peculiar to courts of admiralty, omitting whatever is common to them and courts of common law, because stated elsewhere, so far as we are able to do this, and leave what we have to say of admiralty intelligible. It will be impossible to avoid all repetition, but we shall do so as far as we can.

## SECTION I.

## OF THE RIGHTS AND DUTIES OF SHIP-OWNERS.

It has been held in admiralty in England that a party holding a regular bill of sale of a ship has the legal title, and is entitled to the possession of it against any asserted equitable claim in others. In other words, the English court of admiralty, prior to the passage of the 3 & 4 Vict. c. 65, in determining causes of possession, looked only to the legal title to the vessel, and paid no respect to

any equitable interests.<sup>1</sup> It may be doubted whether our courts of admiralty would declare so broad a principle as this; although the regular bill of sale would doubtless have great force here.<sup>2</sup> And even in England it is made a question how far a court of admiralty must regard itself as so far ministerial, that it must decree possession on the bare legal title, under a bill of sale, in

<sup>1</sup> See cases *ante*, p. 187, n. 1.

<sup>2</sup> It has, however, been distinctly held that our courts of admiralty have no jurisdiction to try questions of equitable title to vessels, and can only pass on the legal title. The *Wm. D. Rice*, U. S. D. C. Mass., Nov. 1857, per *Ware*, J., 20 Law Rep. 501; and in *Kellum v. Emerson*, 2 Curtis, C. C. 79, 82, Mr. Justice Curtis said: "The equitable title of the libellant, as a *cestui que trust*, being denied, it must be tried; and if found to exist, a court of equity would protect it and grant the appropriate relief. But a court of admiralty has not jurisdiction to try such an equitable title, and to grant the relief appropriate to it. Though it may, by a petitory suit, try the title to a vessel, I apprehend this must be confined to legal titles. I am not aware that in any case it has gone beyond these, and tried and determined and undertaken to compel the performance of mere trusts. Still less that it has done so to determine rights, not to a vessel, but to its proceeds." See also *Kynoch v. The S. C. Ives*, 1 Newb. Adm. 206, where the court refused to decree possession of the vessel to one to whom the owner had contracted to sell her. In *The Oriole*, 1 Sprague, 31, it was held, where there was a contract for the sale of a vessel, the purchaser to have title upon the performance of a condition at a future day, and in the mean time to have possession, that on the breach of the condition the owner was entitled to possession. The court refused to go into the equities of the case. In *The John Jay*, 3 Blatchf. C. C. 67, a libel *in rem* was filed to foreclose a mortgage. In the circuit court a motion for leave to amend the libel was made so as to change the action to a possessory suit. The motion was refused, and *Nelson*, J. doubted whether the court could have jurisdiction if the libel were in that form, and said: "I am not aware of any case or of any settled practice or usage of the courts of admiralty in this country, affirming the jurisdiction of those courts in cases where the title to, or rights of property in vessels, simply, has been in dispute, and where the proceedings have been instituted to recover the possession, except between part-owners." On appeal, *Wayne*, J., said, that courts of admiralty had never taken jurisdiction to enforce the payment of a mortgage, "or by a possessory action to try the title, or right to the possession of a ship." *Bogart v. The John Jay*, 17 How. 402. In *The Taranto*, 1 Sprague, 170, a company was formed for the purpose of proceeding to California, a vessel bought, and the bill of sale was permitted by a vote of the company to stand in the names of their agent and treasurer, and of the captain. These parties refusing to give up the vessel, a petitory and possessory suit was brought, and it was contended for the respondents that the legal title of the vessel being in them, the court could not enforce a mere equitable title. The court, however, decreed that the title was in the libellants, and ordered the vessel to be given up.

opposition to the equity of the case.<sup>1</sup> And the court there will not interfere to give possession of the ship's register to any party whose title to be considered as the registered owner is open to objection and doubt.<sup>2</sup> In this country, it has been held in the prize court that the legal ownership is to be decided by the bill of sale; and that any equitable interests existing in the claimants are immaterial to the question of ownership.<sup>3</sup> But if a party has declared himself in the acts of a court a part-owner in a privateer, he cannot cast off this character, or the responsibilities which attach to it for damages assessed against the privateer, even when his name does not appear on the ship's papers.<sup>4</sup>

The distinction above referred to, between petitory and posses-

<sup>1</sup> The case of *The Sisters* seems to have been earnestly contested. As the case stands in 3 Rob. Adm. 213, it is reported that Charnock proceeded in the court to obtain possession. The other side contended that the allegation of title was not sufficient to admit him to the court. (It was a recital of the bill of sale, and an allegation that he had never sold or transferred the possession.) The allegation was admitted as sufficient. In *The Sisters*, 4 Rob. Adm. 275, it is reported that an allegation was given on the part of the assignees of the estate of Tubbs (possessor in the first suit), pleading several letters and exhibits, and alleging "that Charnock bought only as agent of Kirkpatrick, and that part of the purchase-money had been paid to Charnock by his employer." A correspondence was exhibited, which was asserted to have passed between them, for the purpose of showing that Charnock acted as the agent of Kirkpatrick. The counsel on the other side said that all the parties had become bankrupt, "and the question is whether Charnock shall be stripped of his legal title without retaining so much as is due to him on the purchase."

The court said: "How does it appear that there is any money due to Charnock on this account? That may be a material fact; because I am not disposed to hold as a clear recognized principle, that in suits of possession, this court is absolutely ministerial, and that it is, in all cases, bound to give its aid. If Mr. Charnock has already acted in such a manner as to put the property into the possession and at the disposal of the person for whom he bought as agent, the court may, perhaps, think itself at liberty to hold its hand, and leave all the parties to find their proper remedies in a court which can look into the whole of the transaction, and dispense all the justice that belongs to every part of it. But if the money has not passed to Mr. Charnock for the payment of this purchase, which it is alleged he made merely as agent, then the equity of the case will be against Mr. Tubbs." The case stood over, and is reported as above in *The Sisters*, 5 Rob. Adm. 155. See *The Empress*, Swabey, Adm. 160; *The Victoria*, id. 408.

<sup>2</sup> *The Frances*, 2 Dods. 420.

<sup>3</sup> *The San Jose Indiano*, 2 Gallis. 268, 284.

<sup>4</sup> *The Mary*, 1 Mason, 365.

sory suits, which prevailed in England, prevents the decisions of their admiralty from applying fully to our own courts. Lord Stowell, while asserting both the right and the practice of his court to transfer possession from an actual holder, "sometimes by its own movement, sometimes at the instance of other courts," declares that it moves within very narrow limits, "if it proceeds at all originally upon a question of title."<sup>1</sup> Thus, it would act where the possessor had no right, or where force and violence or fraud were manifest, but it would not enter into the question, if there was a course of transactions involving fraud. Now we know no good reason and no authoritative decision which would lead us to suppose that an American court of admiralty would confine itself within such narrow limits, or refuse to enter into a full investigation of any such case, in all its relations.<sup>2</sup> It has, indeed, been the admitted right and the practice of English admiralty, from a remote period to the present day, to take jurisdiction where part-owners cannot agree about the employment of a ship, and to apply a remedy to the case which no other courts could apply. In doing this, they have certain rules; but we should not believe that they would be recognized as of binding authority. Thus, a majority of part-owners, — that is, a majority in interest, — may dispose of a ship as they will, provided they give the dissenting minority adequate security for the safe return of the ship, in the proper form and to the satisfaction of the court.<sup>3</sup> But the reason why this jurisdiction of admiralty has always been admitted, which is "that ships are made to plough the seas and not to lie by the walls,"<sup>4</sup> applies just as strongly where a majority refuse to employ her at all. In this way, they might overcome the opposition of a minority, and compel them to let her proceed without any security at all, if the court interfere only when the majority wished to send her somewhere. It has, therefore, been asserted by our supreme court that, if a majority refuse to employ her at all, the minority may employ the ship on giving security. And if the interests for

<sup>1</sup> *The Pitt*, 1 Hagg. Adm. 240, 243.

<sup>2</sup> This question is discussed at length by Mr. Justice *Story*, in the case of *The Sch. Tilton*, 5 Mason, 465, to which we refer the reader for a full and learned exposition of the law on this subject. See also *The Friendship*, 2 Curtis, C. C. 426.

<sup>3</sup> *Ouston v. Hebden*, 1 Wilson, 101.

<sup>4</sup> *Molloy*, book 2, ch. 1, § 2.

the employment and against it are equal, the court will give possession to those part-owners who are for employment. This has, as yet, only been asserted *obiter*; and, in our judgment, the English authorities do not sustain it. But the assertion of the Supreme Court has never been withdrawn, and we think it rests on good reasons.<sup>1</sup>

<sup>1</sup> In *Steamboat Orleans v. Phœbus*, 11 Pet. 175, Mr. Justice Story said: "The majority of the owners have a right to employ the ship in such voyages as they may please, giving a stipulation to the dissenting owners for the safe return of the ship, if the latter, upon a proper libel filed in the admiralty, require it. And the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all. So the law is laid down in Lord Tenterden's excellent treatise on Shipping." This may be law, and we think it is; but the point did not arise in this case, it being an application by an owner of one sixth of the vessel, to have her sold, on the ground that the vessel was being used contrary to his wish and interest; but we do not understand any passage in Abbott on Shipping, as asserting all of this doctrine. The only passages we find, read as follows: "The law of this country appears to possess an important advantage over all the ordinances that have been cited, because, while it authorizes the majority in value to employ the ship, 'upon any probable design,' it takes care to secure the interest of the dissentient minority from being lost in the employment of which they disapprove. And for this purpose, it has been the practice of the court of admiralty, from very remote times, to take a stipulation from those who desire to send the ship on a voyage, in a sum equal to the value of the shares of those who disapprove of the adventure, either to bring back and restore to them the ship, or to pay to them the value of their shares. When this is done, the dissentient part-owners bear no proportion of the expenses of the outfit, and are not entitled to a share in the profits of the undertaking; but the ship sails wholly at the charge and risk, and for the profit of the others," . . . "If the minority happen to have possession of the ship, and refuse to employ it, the majority also, may, by a similar warrant, obtain possession of it, and send it to sea, upon giving such security." . . . "It does not appear that any of the cases which I have just referred to, arose upon an equal division of voices or interests in the ship." It seems that this must mean, that when the majority have possession, they may not send her to sea without giving security to the dissentient part-owners, if the latter demand it; and when the minority have possession of the ship, the majority may, on giving security, take her and employ her. But nothing is said here, of the case of a majority preferring to do nothing, and of the minority acquiring thereby a right of control. If the court in *Steamboat Orleans v. Phœbus* mean to rely on Abbott for their law, it would not seem that they have authority enough for all their conclusions.

In 3 Kent Com. 152, it is also said: "If the part-owners be equally divided in opinion in respect to the employment of the ship, either party may obtain the like security from the other seeking to employ her." For this, he also refers to Abbott, and in the next note, quotes from *Steamboat Orleans v. Phœbus*. Per-

In England, a decree of possession has been refused to one who

haps the mistake, if it be one, arose from this passage in Abbott, which immediately follows that last quoted: "but a learned civilian who wrote near the end of the 17th century (Godolphin, Introduction to Admiralty Jurisdiction), having spoken of this power of the majority, adds, that the same thing may also be effected by the one part only, in case of equality in partnership; this doctrine is adopted by Molloy, and is followed in the practice of the court of admiralty." The words, "and this doctrine is followed in the court of admiralty," seem to be all that this assertion is based upon. It does not appear to be a quite sufficient foundation; and unless Abbott had means of information other than the reports give us, he was mistaken. A short review of the cases will show whether this be so or not.

In *The New Draper*, 4 Rob. Adm. 287, before dispossessing a master, and part-owner to the amount of seven sixteenths shares, at the suit of nine sixteenths, the court said, that for so small a majority to dispossess a part-owner in possession, some reason was necessary. The reason was given and proved sufficient. It had been argued, that all the parties proceeding in the suit was not authorized. The court said there was no competent proof of that, though there had been time to get it, and it could not hold loose conversations sufficient to defeat the consent by which the suit had proceeded so long. Thus intimating, perhaps, that if proof could have been produced, the case would have been different. Supposing two sixteenths had withdrawn from the nine sixteenths, or that one sixteenth had gone over to the seven sixteenths, what would have been the consequence?

In *The Valiant*, 1 W. Rob. 64, 67, Dr. *Lushington* said: "I am of opinion that this court can never proceed to change the possession, save at the application of a majority of the whole of the legal interests."

*The See Reuter*, 1 Dods. 22, was on application of a majority of the interests. So was *The John of London*, 1 Hagg. Adm. 342. See remarks to this effect in *The Windsor Castle*, 1 Notes of Cases, 118.

In *The Egyptienne*, 1 Hagg. Adm. 346, n., upon the fourth default being granted by the court, it was moved to decree possession "to the sole executrix of H. L. deceased, who was, whilst living, the true and lawful owner of one half part or share of the said sloop." "This motion was refused, but the court granted a monition, calling upon the other interest to appear and show cause." The reporter then adds: "The monition was not extracted, and the cause has dropped."

In *The Elizabeth & Jane*, 1 W. Rob. 278, on a request by a moiety for a monition to the other moiety to appear and show cause, the counsel for the petitioners argued, that "unless possession was decreed as prayed, the vessel must inevitably perish, contrary to all principles of justice and the policy of the maritime law." He cited *The Egyptienne*, and, among others, the very authorities cited from the civil law by Abbott, namely, Godolphin's View of Admiralty Jurisdiction; Molloy, lib. 2, c. 1; and, finally, Abbott on Shipping as above.

But Dr. *Lushington* considered that the court was not authorized to interfere in any case, except where the majority in interest invoked the protection of the court. This is a strong case, for it was decided Nov. 11, 1841, more than a year



owned only a moiety.<sup>1</sup> We should expect that our courts would decide any question of this kind which came before them, only as its merits, and all its merits, required.<sup>2</sup> Doubtless, if a majority concur in desiring any especial employment, this would be a strong *prima facie* reason in its favor. But if it were made clear to the court that they wished to oppress the minority, or that the employment they proposed was certainly and in a high degree inexpedient, because unsafe and foolish, we know not why they should be bound to give her to the majority for any such purpose. And if the majority would employ her in this way, or not at all, we know no reason why she should not be either sold or given to the minority, on their security.

It has been said that the majority employing a ship against the will of the minority, must give security for her safe return.<sup>3</sup> The

after the statute of 3 & 4 Vict. c. 65 (7th Aug. 1840), and it seems to oppose Abbott, Kent, and Story, at least as to English practice. But it will be noticed that the court say they would send the parties to another tribunal; probably, to a court of chancery. In this country, would not the admiralty take the place of the equity court? It exercises many of the functions of a court of equity. And it would be inequitable for one moiety to be subjected to a serious loss from the obstinacy of the other moiety.

Upon the question of possession between dissentient part-owners, two principles appear to meet and conflict; namely, the rights of the majority, and public policy. If a moiety is divided against a moiety, the law can give possession to either only on public grounds. And if a court of admiralty can interfere, it is only on the consideration *pro bono publico*; and that may have lost something of its force, since the present abundant supply of ships. Formerly ships were scarcer, and it was in some measure an infringement on the rights of the mercantile public, a breach of a duty, if not of a kind of implied contract, to let a ship lie still; but now there are, generally at least, more ships than there is business for.

There may be a difference, too, between taking the possession from one moiety to give it to the other, and compelling the moiety already in possession to give bonds. For the latter there may be reasons which do not apply to the former.

<sup>1</sup> The *Egyptienne*, 1 Hagg. Adm. 346; The *Elizabeth & Jane*, 1 W. Rob. 278.

<sup>2</sup> See *Coverdale v. The North America*, Crabbe, 420, and the case of The *Vincennes*, decided by Ware, J., but not reported, cited *post*, near the end of c. x.

<sup>3</sup> In The *Marengo*, 1 Sprague, 506, the owner of one fourth of a whale ship, before any preparation had been made for a new voyage, gave notice to the owners of the major part that he would not pay anything towards outfits or expenses for a new voyage, but did not say in terms that he should dissent from the voyage, or apply for security for the return of his quarter part, until the vessel was nearly ready for sea; but it did not appear that the major part-owners

common bond taken in England from the majority goes no further ; and it has been intimated in this country, that the recusant part-owner should have no freight, because he makes no advances for outfit, but may have his vessel secured to him, because, as he makes no profit, he should incur no loss.<sup>1</sup> This may be sound doctrine in all of those cases in which the dissentient minority are distinctly in fault. But there may be an honest difference of opinion ; and although the majority in that case ought to prevail, we see no reason why the minority should not be paid for the use of their property ; and we should not expect that our courts would hold themselves bound by any rule in admiralty, to confine the security to the return of the ship in all cases. The authorities, however, seem to be opposed to any payment for the use of the ship.<sup>2</sup>

had been misled or subjected to any loss by such delay. Held, that the libellant was entitled to security by stipulation for the return of the vessel, in double the value of his interest, and that such return should be to the port of New Bedford where all of the owners resided. The libellant requested that his part of the outfits of the preceding voyage which remained on board should not be included in the estimate of the value of his part of the vessel, and this request was granted.

<sup>1</sup> See *Willings v. Blight*, 2 Pet. Adm. 288.

<sup>2</sup> The question, whether the bond should secure the freight as well as the vessel, is one of importance ; and we find no decisive authority to determine it. In *The Apollo*, 1 Hagg. Adm. 306, peremptory payment of the bond was decreed. "Upon the question of jurisdiction, it is not unimportant to observe that the court has repeatedly gone the length of taking those stipulations in favor of a dissentient copartner, and upon his application that a security may be given for the safe return of the vessel from the voyage to which he dissents, or otherwise for the estimated value of his share." Nothing is said about freight. Nor do we know that any admiralty court has declared that the bond may be taken for the freight. The estimated profits of the voyage are a difficult subject of computation, and that is the objection Abbott (p. 102) takes to the remedy proposed by the common-law courts for the use of the ship by the minority, without their consent. The reason given that "as he bears no expense, he shall have no profit," is hardly logical or sufficient, for from that it would seem, that his right to profits depended on his expenditures for fitting out ; but the interest of the money he has invested in the ship is not considered. In *Gould v. Stanton*, 16 Conn. 12, it was held that until a dissentient part-owner applies to the admiralty court, he is liable for his proportion of the expenses already incurred in fitting the vessel out, but after he seeks the protection of the court he is not liable for any expenses, nor entitled to any earnings.

In *The Marengo*, U. S. D. C. Mass., 1866, *Lowell, J.*, 1 Am. Law Review, 88, a part-owner who had dissented from the employment of a vessel on a voyage, and

In England, it is held that a British part-owner of a foreign ship, cannot arrest the vessel for the purpose of obtaining bail to be given for her safe return to her home port. Dr. Lushington, however, intimated that if a dissenting part-owner had such a remedy, by the law of the country to which the vessel belonged, he would take the matter into consideration.<sup>1</sup>

The fact that a part-owner has not complied with the acts of Congress, in delivering up the old license and obtaining a new one on becoming an owner, does not prevent his applying to the court for security for the safety of the vessel on a voyage not approved by him, such omission not being for purposes of fraud or concealment.<sup>2</sup>

Of the power of the court of admiralty to decree a sale on a question between part-owners, we shall speak when we consider the subject of Sale by order of Admiralty.<sup>3</sup> A decree of a court of admiralty, awarding possession to a person, does not have the effect of a sale, and pass the vessel free from all prior incumbrances.<sup>4</sup>

We have already considered at some length<sup>5</sup> the right of the had taken a stipulation for her safe return, after the voyage had ended prosperously applied to the court to recover compensation for the use of the libellant's part of the vessel, and the value of his part of such of the outfits remaining from the preceding voyage, which had been used on the voyage in question. The libellant argued that the law which authorized another person to use his property ought to require payment to be made for that use; but the court held that the libellant was not entitled to recover for the use of his part of the vessel, and that a court of admiralty had no jurisdiction over a claim for the use of the outfits. *Lowell, J.*, said: "It would be more strictly accurate to say, that the law allowed the respondents to use their own property, or to dictate the use of the common property. The libellant's property happened to be, from its own nature, inseparable from theirs; but it may have been as great a hardship for them to be obliged to use it, involving, as such use must, an outlay and risk beyond their proper proportion, as it was for the libellant to have the vessel go upon a voyage which he did not approve. In the average of cases it is equally probable that the majority would be embarrassed by the necessity of equipping and providing the whole vessel, as that the minority would be embarrassed by the necessity of providing for their part."

<sup>1</sup> The *Graff Arthur Bernstorff*, 2 Spinks. Adm. 30.

<sup>2</sup> *Fox v. The Lodemia*, Crabbe, 271.

<sup>3</sup> See *post*, c. x.

<sup>4</sup> The *Granite State*, 1 Sprague, 277.

<sup>5</sup> See *ante*, Vol. I. p. 95, n. 2. In *Richardson v. Mellish*, 3 Bing. 229, an action was brought to recover damages for the breach of an agreement. The facts were

majority to dispossess a master who is a part-owner, and refer to what we have there said. It has been held in England, that if the owner of the greater part of the vessel brings a cause of possession against the master, who is owner of the remaining part, the master will not be allowed to retain possession upon an offer of security to the amount of his co-owner's interest.<sup>1</sup>

Under the English statute of 1854, which gives the court of admiralty power to remove the master of a vessel, if the court is satisfied that the removal is necessary, it has been held that the removal is necessary if the master has committed a fraudulent

as follows. The plaintiff was in command of a vessel then under charter to the East India Company, of which the defendant was owner of twelve sixteenths. The defendant proposed to the plaintiff, and the plaintiff assented, to resign the command in favor of the defendant's nephew upon receiving in exchange the command of another ship, owned by the defendant, and then chartered for one voyage. If the company acceded to the exchange, it was agreed that in case the nephew died or resigned before the expiration of the four voyages for which the ship was chartered, the plaintiff should succeed him. As a further inducement to the plaintiff to resign the command, the defendant undertook to procure a beneficial alteration in the destination of the second vessel. The exchange was approved by the company, and was made. The plaintiff became bankrupt on his return from his first voyage, and the nephew died in the course of his second voyage. The defendant, having refused to appoint the plaintiff to succeed the nephew, was sued. After a verdict for the plaintiff, the court held, on motion for a new trial, that after verdict there was a sufficient consideration for the defendant's agreement; that the agreement was not illegal; and that the jury might give damages for the loss of the two remaining voyages, though the second had not been accomplished at the time of the action. *Best*, C. J., said that there was no fraud as against the East India Company, for they were apprised of the whole transaction, and in respect to fraud on the co-owners, he said: "It appears on the record that Mr. Mellish is sole owner, and therefore he could commit no fraud on co-owners. . . . Is there any fraud in the proceeding? Sift it from the top to the bottom, and what does it amount to? Nothing more than this: that a man who has the sole interest in one ship, and is about to procure an interest in another, makes a bargain with the captain of the ship to exchange it for another. Is there any fraud in that? I say, no. I am aware of the difference between a legal and a moral fraud. I see no legal fraud. I see nothing in public policy against this sort of exchange being effected. It appears to me there would be nothing corrupt — nothing improper in it; if not, there is nothing to arrest the judgment on the ground of illegality." This language is somewhat ambiguous, as the defendant was not the sole owner in both vessels, and the case seems to go to the extent that such a transaction is not a fraud as against co-owners. See also the remarks of the court on the case of *Card v. Hope*, 2 B. & C. 661.

<sup>1</sup> *The Kent*, Lush. Adm. 495.

breach of trust against the owners, such as making a payment of £ 5 on ship's account, and charging a larger sum as paid, and the court has the power to make this removal on the application of one part-owner, though another who is ship's husband objects.<sup>1</sup>

## SECTION II.

### OF CONTRACTS OF AFFREIGHTMENT.

Whether goods are carried in a vessel on freight or by charter, the same rules of law are applicable in admiralty, unless the charterer hires the vessel wholly, and mans, equips, and sails her himself. In this case he is his own carrier, and the owner of the vessel has no lien on the cargo for the money due from the hirer, but the charterer himself, being *quasi* owner, has a lien on the goods of other persons, if he carries them in a ship he has thus hired.<sup>2</sup>

The first question we shall consider is, as to the jurisdiction of admiralty over questions of freight; then the application of the rules of law to these questions in civil cases; then cases which arise under prize and capture.

In treating of the law of shipping, it was stated that the ship-owner has a lien on the cargo for the freight due in carrying it. This is the rule at common law as well as in admiralty, but the latter court, by its suits and processes *in rem*, has a more prompt and effectual jurisdiction in all cases of lien. Originally, the admiralty courts acted principally and possibly altogether *in personam*,<sup>3</sup> and even now it is admitted that its action *in rem* is subor-

<sup>1</sup> The *Royalist*, Brow. & L. Adm. 46. The part-owner making the application was owner of one half the vessel. The master was owner of one quarter, and the ship's husband was owner of the other quarter.

<sup>2</sup> The two kinds of charter-parties are spoken of in our chapter on the law of shipping. See *ante*, Vol. I. p. 278.

<sup>3</sup> In *The Sch. Boston*, 1 Sumner, 328, 341, it is said: "The proceeding need not indeed be *in rem*, for if the thing has come to the possession or use or benefit of the owner, a compensation may be equally decreed upon a libel *in personam*. So is the doctrine in *The Hope* and *The Trelawney*, and it is founded in the very nature of the admiralty jurisdiction, which primarily acted *in personam*; and now acts *in rem*, only as auxiliary to its general authority." In *The Hope*, 3 Rob. Adm. 215, the objection to calling the owners to answer personally in a suit for

dinate and auxiliary to its general authority, or its action *in personam*. Nevertheless, it is quite certain that our admiralty courts claim and hold complete jurisdiction *in rem* as well as *in personam* over all maritime contracts in which there is any lien, either by force of law, or by an express pledge of the property by way of security.<sup>1</sup> Nor is an actual possession by the officers of the court, of the property libelled, essential to the exercise of this jurisdiction; for the court may order the property into the custody of the law, and will for the purposes of justice, presume it to be in that custody unless the contrary appears.<sup>2</sup>

salvage was overruled. In *The Trelawney*, 3 Rob. Adm. 216, note, it was said in the argument: "The old practice has always been, in the first instance, against the person; and several of the first chapters of Clerke's Practice, direct the proceedings to be against the person." The court said: "As the objection has been pressed, I shall reserve this matter for further consideration; at present, it may be sufficient to say that the court will be extremely unwilling to hold that because a salvor has chosen to proceed in the manner most favorable and most accommodating to the other party, he shall be deprived of substantial redress in this court."

In *The Meg Merrilies*, 3 Hagg. Adm. 346, a monition *in personam*, was decreed in a suit for salvage. In *The Brig Draco*, 2 Sumner, 157, 180, *Story, J.*, said: "My own opinion has been long unequivocally expressed, that the admiralty has a rightful jurisdiction over all maritime contracts *in personam*; but that, in cases of that sort, it cannot proceed *in rem*, unless there be a maritime lien, or a positive pledge as security."

<sup>1</sup> In *Sheppard v. Taylor*, 5 Pet. 675, it is said, p. 711: "Over the subject of seamen's wages, the admiralty has an undoubted jurisdiction *in rem* as well as *in personam*." See also *The Centurion*, Ware, 477.

<sup>2</sup> In *The Sch. Boliana*, 1 Gallis. 75, the court said: "Further; in the admiralty, in all proceedings *in rem*, the court has a right to order the thing to be taken into the custody of the law, and it is presumed to be in the custody of the law, unless the contrary appears; and when once a vessel is libelled, she is considered as in the custody of the law and at the disposal of the court, and monitions may be issued to persons having the actual custody, to obey the injunctions of the court. The jurisdiction of the admiralty, however, is not founded on that circumstance." (We suppose this means the circumstance of possession.) "It is notorious, that a condemnation may take place in a prize cause, even when the prize is lying within the port of an ally or a neutral, and this right of jurisdiction and condemnation equally applies to municipal seizures, in the name of the sovereign, while the property is in a neutral port. If, indeed, the possession of the sovereign be lost by recapture, or escape, or voluntary discharge, the courts may thereby lose the jurisdiction acquired by the seizure, but such loss is not to be presumed. On the instance side of the admiralty, its jurisdiction is not, in general, founded on possession of the thing. It may exercise

That the ship has a lien on the cargo for the freight, is an ancient and a universal rule. And the application of the law of lien to cases of freight, by the rules of admiralty, is, we think, or at least should be, more liberal and less technical than by those of common law. But while this lien of the ship upon the cargo for its freight has never been denied, there is a great and irreconcilable diversity of opinion as to the origin, the nature, and the principles of this lien. The common-law courts of England have been always disposed to regard it as a mere common-law lien. This we should expect; and the inevitable consequence has been a strong disposition, perhaps a prevailing tendency, in our own common-law courts, to follow the English example. But this has led to some difficulties; and some judges refer it rather to the peculiar principles of the law merchant. These differences are not technical merely or theoretical. They certainly may lead to important results, as they have led to difficult questions. But these questions are due, we apprehend, in some degree at least, to the antagonism between the common law and the Roman civil law.

There may be difficulties in regarding the claim of the ship upon the cargo as precisely a "*privilegium*" of the civil law, and as we have already said in our first volume, we do not call it a *privilegium*.<sup>1</sup> It certainly, however, was an essential part of the law merchant before that became a part of the common law of England. And then, and now on the continent of Europe, it was and is distinctly recognized, although the common-law lien is nearly unknown. A *privilegium*, which is well enough translated by the phrase, "a privileged claim," differs from a lien in this: it does not depend in any degree upon possession; that is, it does not require that the creditor should ever have possession of the thing to which he may look for security; nor if he has such possession and loses it, does he thereby lose his security. On the complete jurisdiction as to seamen's wages, as to marine torts, as to collisions, and perhaps as to salvage, without it, and rest entirely on the process in *personam*."

In the case of *Jennings v. Carson*, 4 Cranch, 2, *Marshall*, C. J., fully discussed the principle that the vessel when once libelled is in the possession and under the control of the court. After showing that this power is inherent in the courts, and not conferred by statute (as had been contended in argument), he shows that it necessarily results from the constitution and character of a court of admiralty.

<sup>1</sup> See *ante*, Vol. I. p. 176, n.

other hand, a lien at common law is simply the right of holding on to something now in possession, until some claim or debt connected with that thing is discharged. We do not call this lien of the ship on the goods a "*privilegium*," because we cannot say that it has no reference, either in origin or continuance, to possession. But neither do we regard it merely as a common-law lien, because we do not consider it as a mere right to retain possession, and as wholly dependent on possession, and as terminated at once and necessarily by the loss of possession.

What are called liens in the law of shipping are none of them, we think, mere common-law liens; or mere continuances of the right of possession. And we have noticed that text-writers who, in the investigation of the principles which govern them, have gone back to the early or foreign law, adopt perhaps without intention the phraseology there used, and call the liens "privileges," or "privileged claims." Thus, Abbott, in the beginning of the chapter on the ship-owners' lien for freight, speaks of the lien of the cargo on the ship, as ranking "low in the precedence of *privileged claims*," and to illustrate this, enumerates nearly all the known liens against the ship, ten in number, as of more force; and then speaks of the "privilege" of the ship-owner against the goods for his freight.

This right of the ship-owner to hold the cargo as security for the freight, we hold to be in part a *privilegium*, and so far not a mere lien; and therefore it is not dependent, necessarily and entirely, upon possession, or the right of possession. And the law merchant has many such "privileged claims"; as, for example, contracts of bottomry or respondentia. No one would think of calling the rights which these contracts give, merely liens, or of treating them as liens at common law. Nor is there any more reason in the right itself for calling that of the ship-owner against the cargo a lien only. The cause of this common error, for we regard it as an error, is quite obvious. The main difference between a *privilegium* and a lien is, as we have seen, this: the former is not dependent upon possession, but the latter is. Now the contract of bottomry, for example, actually provides that the ship shall go away, out of the possession and immediate reach of the creditor (for which departure it provides the means), and that the debt itself shall be due only on condition that the ship



performs the voyage safely. It would, therefore, be merely absurd to say that the security of the creditor depends, in this case, upon his retaining possession, for the very essence and purpose, and the very words, of the contract, require the ship to pass out of his possession.

But in the contract for freight, the bargain is that the goods shall be put into the possession of the ship-owner, and shall remain in his possession until the freight becomes due and is paid. Here, therefore, the nature of the bargain, and the terms of the contract, give to this "privileged claim" that element of possession which the common law gives to every lien. The essence of the bargain is, that the ship shall take possession of the goods and carry them, and then keep possession of them for the freight. And if the parties agree that the goods shall be delivered first, that is, shall pass out of the possession of the ship-owner before he gets his freight, and that he shall then look, not to the goods, but to the shipper for his freight, this would destroy the security by terminating the lien; and thus, in effect, it appears, to convert the privilege into a lien. Or, in other words, this right of the ship to the goods seems, for these reasons, to be perfectly dependent upon possession, and therefore, we think, it has been called and treated as a mere lien. But there is still a difference between these two views of this right, which is more than technical, and may be very substantial. It is this. If this right be a lien, it is at once destroyed by any agreement which provides that the possession of the ship-owner shall terminate in any way before he gets his freight. Not so, if it is, or so far as it is, a *privilegium*. There the security of the cargo will not be lost, unless it is a fair inference, from all the terms and circumstances of the contract, that the parties intended to take this security away; or unless (whatever be their intention) it could not be enforced without injury to an innocent third party, who had purchased the cargo, or acquired rights over it. Valin says, as we have seen, that the ordinance of Louis XIV. in practice permitted the ship-owner to retain his right against the cargo fifteen days after it had been delivered, unless it were in the mean time sold to a purchaser without notice. We do not suppose our admiralty courts would adopt this or any other exact rule; but wherever there was a bargain which provided that the shipper or consignee might take the goods first, and afterwards pay for

them, but which, by reason of its terms or its circumstances, should be construed as indicating no intention on the part of the ship-owner to give up his security on the cargo, we should confidently expect a court of admiralty to protect this security by a process *in rem* against the cargo.<sup>1</sup>

Abbott remarks: "The clause whereby the merchant binds the cargo, does not give to the owner a lien on the cargo for the performance of the covenants in the charter-party, nor for any payments for which he might not detain it in the absence of such a clause, so that with us the clause is inoperative."<sup>2</sup> We apprehend that an American court of admiralty, always of course regarding the equities of each case, would generally enforce by adequate process that security upon the cargo which the terms of the contract would purport to give.<sup>3</sup> But it is certain that express agreements, as to this lien or claim, might make the question whether they confirmed, or annulled, or in any way qualified the claim as given by the maritime law, one of great difficulty. And, if a ship-owner who has this privileged claim, delays long, and without cause or excuse, to enforce it, he would be held in this case, as in all other cases of maritime lien, to have renounced or lost it.<sup>4</sup>

The owner of the cargo has a lien on the ship for any injury he may sustain by the fault of the ship or of the master. And this

<sup>1</sup> See *ante*, Vol. I. p. 178, n.; and the case of *Sears v. Certain Bags of Linseed*, there referred to.

<sup>2</sup> Abbott on Shipping, 286.

<sup>3</sup> See *ante*, Vol. I. p. 303, note.

<sup>4</sup> In *The Rebecca, Ware*, 188, 211, which was an action *in rem* against a vessel for damages sustained by goods on board, it was contended that the shipper had lost his lien by neglecting to enforce it within a reasonable time. The evidence was, that the shipper resided in New York, and the vessel belonged to Portland, in Maine; that as soon as the shipper heard of the loss he ordered process to be commenced, but before it could be served she left the port and did not return for nine months, when she was immediately arrested. In the intervening period, she was engaged in transporting rocks between the Hudson River and the Delaware Breakwater, and passed the city of New York at every trip, and that twice she stopped at that port for a few days; but there was no evidence that these facts were known to the libellant, and the court was of the opinion that the circumstances were not strong enough to justify a presumption of knowledge on the part of the libellant that the vessel was at New York, and it was held that the delay was no bar to suit.

lien may be enforced in admiralty by a suit *in rem*. And the vessel is regarded as pledged to the owners of the goods from the moment the misfortune happens, and their claim will be held prior to the general creditors of the owners.<sup>1</sup> This liability of the ship begins on the reception of the goods by the master or some one authorized by him, either on board the ship or at a wharf. Therefore if while the goods, after coming into the custody of the master, are being transported by him on a lighter in the usual course of trade at that port, and are damaged, the vessel is liable *in rem*.<sup>2</sup> And though this lien will be lost by unreasonable delay, it is not defeated by a *bond fide* sale with transfer of possession, if made before the shipper had the opportunity of enforcing his lien. This would be so, even if the purchaser were ignorant of the lien, unless the delay had been such as to cause or substantially contribute to the purchaser's buying a vessel thus encumbered.<sup>3</sup>

Nor will acceptance of the goods by the consignee, or a receipt that they are delivered in good order, defeat or waive this lien, unless made with a knowledge of the injury, or under circumstances which fairly indicate an intention to waive the lien.

In a case where a person took passage on board a vessel, but his personal baggage did not reach him before he sailed, and it was afterwards put on board another vessel by the agent of the libellant, and a bill of lading given therefor, but the baggage never arrived, it was held that this vessel was liable *in rem*, the case being considered as an ordinary shipment on freight, and the owner of the vessel not a gratuitous bailee.<sup>4</sup>

<sup>1</sup> The Rebecca, Ware, 188, 211; The Phebe, Ware, 263; The Waldo, Davis, 161; The Sch. Volunteer, 1 Sumner, 551; Certain Logs of Mahogany, 2 Sumner, 589; Steamboat Robert Morris v. Williamson, 6 Ala. 50; and cases cited *ante*, Vol. I. p. 173, n. 1. In Rich v. Lambert, 12 How. 347, which was an action *in rem*, no question was made as to the jurisdiction of the court, except by Mr. Justice Daniel, who dissented on the ground that as the contract was made on land, that is, in the city of Liverpool, and was to be fulfilled on land by the delivery of the merchandise in the city of Charleston, there was no jurisdiction in admiralty. We should suppose, however, that most maritime contracts are made on land; and nearly all suppose an arrival somewhere, and the completion and consummation of the contract on or after such arrival.

<sup>2</sup> The Bark Edwin, 1 Sprague, 477, s. c. *nom.* Bulkley v. Naumkeag Steam Cotton Co. 24 How. 386.

<sup>3</sup> The Rebecca, Ware, 188, 212.

<sup>4</sup> The Elvira Harbeck, 2 Blatchf. C. C. 336.

The jurisdiction of the admiralty over actions *in personam* for the non-delivery of the cargo, has been fully sustained by the Supreme Court of the United States.<sup>1</sup> But it has been held that, where a vessel is detained in her port of lading by ice, and her cargo is damaged before she can proceed, a shipper cannot, without rescinding the contract, sustain a libel *in rem* for a breach of the bill of lading, until the term for the performance of the contract has expired.<sup>2</sup>

The owners of a vessel let to the United States for a transport, in time of war, have no lien for their charter-money on goods the United States may put on board.<sup>3</sup>

### SECTION III.

#### OF FREIGHT IN CASES OF PRIZE.

In reference to the questions of freight in cases of prize and capture, they belong, for the most part, exclusively to admiralty. The first question is this, if an enemy's cargo is captured in a neutral vessel, has the vessel a claim on the captors for freight? It would seem that it has; for the cargo is distinct from the freight; one belongs to an enemy and may be made prize of, but the ship belongs to a friend and must not be taken.<sup>4</sup> But the rule

<sup>1</sup> New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344.

<sup>2</sup> Jones v. The Floating Zephyr, U. S. C. C. Penn., 7 Am. Law Reg. 494. The vessel, in this case, was lying at the port of Philadelphia, bound for Liverpool. In the month of December, a number of barrels of flour belonging to the libellant were shipped on board and bills of lading given. A quantity of corn was also shipped by other persons, by which it was alleged the flour was damaged. In the month of February following, the flour was taken on shore by order of the master, and surveyed and ordered to be reshipped. The vessel sailed after the filing of the libel in this case, and delivered her cargo to its consignees. The court held that the action was prematurely brought, and the libel was dismissed. This decision is, however, we think, open to the objection that at the time the suit was brought, the vessel had incapacitated herself from delivering the flour in good condition, and therefore an action would lie immediately. See 2 Parsons on Contracts, 5th ed. 666.

<sup>3</sup> The Undaunted, 2 Sprague, 194.

<sup>4</sup> In a note to The Atlas, 3 Rob. Adm. 304, in answer to an assertion of M. Schlegel, a French author, that the English never gave freight to a neutral vessel, the reporter makes the following reply: "So long back as the year 1640, it is asserted, on the authority of Sir H. Martin, who was an eminent practitioner and afterwards judge of the court of admiralty, that it had never been the practice to

is limited by the reason of it; and if the cargo be contraband,<sup>1</sup> or the voyage be *quasi* contraband,<sup>2</sup> or undertaken to relieve an enemy from the distress caused by war, as a carrying on of her coasting trade,<sup>3</sup> or colonial trade,<sup>4</sup> then, it seems, the neutral

condemn neutral ships for having enemy's goods on board, but the freight of the enemy's goods condemned was always paid. Sydn. St. Papers, vol. 2, p. 662. In the year 1704, in the court books of the admiralty, there is the case of *The Pearl*, Thompson, in which a question was raised on this point, though the particular circumstances on which the demand was resisted do not appear. In the result, freight was decreed to the ship, restored on a claim of a Mr. Eliason, a Danish merchant, although the cargo claimed for him also was condemned. In the year 1753, in the celebrated answer to the Prussian memorial, it is asserted, that in the case of ships restored, freight was paid for such of the goods as manifestly belonged to the enemy and were condemned; and among the list of Prussian cases referred to, there is a class described, 'ships restored with freight according to the bills of lading for such goods which were found to be the property of enemy, and condemned as prize.' Conformable to the ancient principle of the Consolato and these precedents, has been the invariable practice of the British court of admiralty during the last and the present war, unless in cases where some circumstance of *mala fides* occurs," etc., etc.

The general rule and its exceptions are thus stated by Mr. Justice Story in *The Commercen*, 2 Gallis. 261, 264, 1 Wheat. 382: "The general rule, that the neutral carrier of enemy's property is entitled to his freight, is now too firmly established to admit of discussion. But to this rule there are many exceptions. If the neutral be guilty of fraudulent or unneutral conduct, or have interposed himself to assist the enemy in carrying on the war, he is justly deemed to have forfeited his title to freight. Hence, the carrying of contraband goods to the enemy, the engaging in the coasting or colonial trade of the enemy, the spoliation of papers, and the fraudulent suppression of an enemy's interest, have been held to affect the neutral with the forfeiture of freight. And in cases of a more flagrant character, such as carrying despatches or military passengers for the enemy, or an engagement in the transport service of the enemy, or a breach of blockade, the penalty of confiscation of the vessel has been also inflicted." See also *The Prosper*, Edw. Adm. 72.

<sup>1</sup> *The Sarah Christina*, 1 Rob. Adm. 237; *The Mercurius*, 1 Rob. Adm. 288.

<sup>2</sup> In *The Commercen*, 2 Gallis. 261, it was held that a neutral cannot lawfully be the carrier of provisions for the supply of the army of a belligerent, although such army may be in a neutral country and directly engaged in hostilities against a third belligerent. This was affirmed by the Supreme Court, 1 Wheat. 382. *Marshall*, C. J., *Livingston*, J., and *Johnson*, J., dissenting.

<sup>3</sup> *The Atlas*, 3 Rob. Adm. 299, 304; *The Emanuel*, 1 Rob. Adm. 296; *The Allegoria*, 4 Rob. Adm. 202, n. In *The Wilhelmina*, 2 Rob. Adm. 101, n., it was held that this rule did not apply to voyages from the port of one enemy to the port of another, if no fraudulent or false proceedings appeared in the conduct of the ship.

<sup>4</sup> *The Immanuel*, 2 Rob. Adm. 186; *The Anna Catharina*, 4 Rob. Adm. 107;

vessel forfeits her freight. And the vessel is not entitled to freight, if the master ceases to act as a neutral, as by the spoliation of papers.<sup>1</sup> Capture is considered equivalent to delivery where the captor possesses himself fully of the right of the enemy and represents him, and by the capture prevents the ship from earning her freight, and the neutral is in no fault.<sup>2</sup>

But if a vessel goes into port to repair, and is there seized and required to prove her neutrality, and the delay in doing this makes it necessary to transfer the goods before she is liberated, she has earned only a *pro rata* freight, because it was not the fault of the goods, but her own distress, which caused the transshipment.<sup>3</sup>

The *Minerva*, 3 Rob. Adm. 229, note; The *Anna Dorothea*, 3 Rob. Adm. 233, note. In The *Rose*, 2 Rob. Adm. 206, the voyage was from the port of one enemy to the colony of another enemy allied in the war. It was held that there was no solid distinction between this case and those above cited. The ship also is sometimes confiscated for trading between the mother country and a colony of the enemy. The *Jonge Thomas*, 3 Rob. Adm. 233, note; The *Phoenix*, 3 Rob. Adm. 186; The *Star*, 3 Rob. Adm. 193, note.

<sup>1</sup> The *Rising Sun*, 2 Rob. Adm. 104. It was objected, in this case, that the owners were at a great distance and in no way privy to the act of the master, but the court said, that "men must abide the consequences of their own misplaced confidence."

<sup>2</sup> The *Racehorse*, 3 Rob. Adm. 101, was a case of a British ship freighted from Liverpool in ballast to St. Martin's and Lisbon, to bring a cargo of fruit to Ireland, taken on her return voyage by a French privateer off Falmouth, and afterwards recaptured and brought to Falmouth. The ship was restored by consent, on the 2d of July; the cargo was not restored until 16th November. The court held that the whole freight was due, on the ground that it was not the ship's duty to stay by and see what would be done with the cargo.

In The *Martha*, 3 Rob. Adm. 106, note, an American ship from America to Amsterdam was captured in the Channel. The ship was restored with freight. One parcel of goods for which a claim had been given was restored, but had to be delivered in order to get at the rest. The claimant demanded of the master that he should take them on board again, and offered to pay the expense of transshipment. This he refused to do, and demanded his whole freight. The court, Sir *William Scott*, gave it, on the authority of the case of The *Hamilton*, decided by his predecessor. See also The *Hoffnung*, 6 Rob. Adm. 231.

<sup>3</sup> In The *Copenhagen*, 1 Rob. Adm. 289, the ship was obliged to put into a port short of her destination for repairs; the ship and cargo, being seized as prize, were restored, but the ship claimed full freight as in a case of capture. Freight *pro rata* was given. The court said: "The maxim that capture is delivery, is by no means to be taken in the general way in which it has been laid down (by counsel for the ship). It is by no means true, except where the captor succeeds fully to the rights of the enemy, and represents him as to those rights.

Freight is not payable when the ship is lost by accident or superior force.<sup>1</sup>

In one case, where the incapacity to proceed fell on both ship and cargo, the court on principles of equity decreed that the loss should be divided, and that a moiety of the freight should be paid.<sup>2</sup> If the neutral sail under a license, no freight is allowed on articles not enumerated in the license.<sup>3</sup>

The rule, that freight is not earned unless the goods are carried to their destination, applies to capture. But if neutral goods are in an enemy's ship and the captor in fact takes the goods where they should have been carried,<sup>4</sup> and even if he does this substan-

If a neutral vessel, having enemy's goods, is taken, the captor pays the whole freight, because he represents the enemy by possessing himself of the enemy's goods *jure belli*; and, although the whole freight has not been earned by the completion of the voyage, yet as the captor by his act of seizure has prevented its completion, his seizure shall operate to the same effect as an actual delivery of the goods to the consignee, and shall subject him to the payment of the full freight. But if ship and cargo, being both neutral, are restored, the consequence is only that the ship must proceed on and complete her voyage before she can demand her freight. If the cargo is restored while the ship continues under detention, still less reason is there to contend that she has earned her freight. Such is the present case, in which the ship has failed in her contract; and this is not owing to the cargo in any manner, but to her own state of distress originally, and afterwards to her dubious character. Under these circumstances, it is impossible to say that she has earned more than a freight *pro rata itineris*.

<sup>1</sup> In *The Saratoga*, 2 Gallis. 164, 178, it is said: "It seems to be a doctrine of our law, that if a voyage be broken up by an interdiction of commerce with the port of destination, after its commencement, no freight is payable. And the same rule is applied to cases where the voyage is lost by accident or superior force. In short, the principle seems to be, that there must be an actual delivery of the cargo at the port of destination, to entitle the party to his full freight. See also cases *ante*, Vol. I. p. 220, 221.

<sup>2</sup> *The Friends*, Edw. Adm. 246.

<sup>3</sup> *The Jonge Clara*, Edw. Adm. 371.

<sup>4</sup> *The Vreyheid*, before the House of Lords, 1784, cited 4 Rob. Adm. 282; *The Fortuna*, 4 Rob. Adm. 278. In *The Fortuna*, Edw. Adm. 56, a Danish ship going to Portugal with a Portuguese cargo was legally detained under an embargo act, and brought to England. The goods at the time, might legally have been sent on, but afterwards, hostilities having commenced between England and Portugal, they could not be forwarded, and were sold in England. It was held, under these circumstances, that the captors were not entitled to their freight. It was said that had an actual war prevented the goods from going on at the time of their seizure, freight might have been allowed, but that "there was not an exist-

tially, though not precisely, as where English captors took, in a Dutch ship, and carried to England, English goods which had been sent from a Dutch colony in a Dutch ship to Holland, with the intention of remitting the proceeds to London, because there was no other way to get them from that colony to England, he is entitled to his freight;<sup>1</sup> he will have freight, even if he takes the goods to another port in the same country to which they were to go, unless, perhaps, this one substantially differed from their port of destination. Nor will the court of admiralty look carefully at the expense or profit of the thing, in applying this rule.<sup>2</sup> If the captor, however, injure the property, he is liable to a claim by way of offset; and if a ship is ordered to be restored in value, because wrongfully taken, full freight will be decreed against the captor, although only a part of the goods be saved, if the loss is owing to the negligence of the prize-master.<sup>3</sup> But a captor held to pay

ing incapacity upon them at the time of capture." It was also held that the sale in England did not make that country their place of destination within the rule.

<sup>1</sup> *The Diana*, 5 Rob. Adm. 67.

<sup>2</sup> In *The Vrow Henrietta*, 5 Rob. Adm. 75, note, it was objected that the captors had not brought the goods to London, to which port they were destined, but to Plymouth, but the court held they were bound to pay for freight. And in the case of *The Ship Ann Green*, 1 Gallis. 274, 294, Mr. Justice *Story* held that captors who brought goods to Boston, which were destined to New York, were entitled to their freight.

<sup>3</sup> In *Der Mohr*, 4 Rob. Adm. 314, the ship had been decreed to be restored in value, with freight to be a charge on the cargo, which was ultimately condemned for want of further proof. But the cargo had been lost, together with the ship, by the negligence of the prize-master. The captors were held liable for the freight, the cargo, the fund from which it was to be paid, being lost. Sir *William Scott* said: "On the principle of law, however, I am of opinion that the freight must be taken as having become as much the property of the neutral claimant, as the ship itself. The captor took *cum onere*. If the loss had happened by accident only in bringing in, the captor, having made a justifiable seizure, would not have been liable to any restitution, either for the freight or for the ship; but the court has already pronounced this loss not to have arisen from any casual misfortune. The freight is as much a part of the loss as the ship, for he was bound to answer equally for both. The captor has, by taking possession of the whole cargo, deprived the claimant of the fund to which his security was fixed. He was bound to bring in that cargo, subject to the demand for freight. He was just as answerable for the freight of the voyage as for the ship which was to earn it, or which was rather to be considered as having already earned it. In the room of this fund, the captor has substituted his own personal responsibility, for the loss accrues by the fault of his agent. I see no distinction under which I can



freight will not be bound in all cases by the terms of the charter-party, but if those are excessively high from the influence of peculiar circumstances, a different and more equitable rule will be applied.<sup>1</sup> In a case of recapture, and a claim of salvage thereon, if a commencement of the voyage takes place and it is afterwards completed, the whole freight is included in the valuation of the property on which salvage is decreed.<sup>2</sup> Where a vessel, fitted out in one of our ports in breach of neutrality, was captured and restitution decreed, rejecting the claim of an alleged *bond fide* purchaser in a foreign port, it was said, that he would have been entitled to repayment of the freight which he had paid on the captured goods, if the claim had been presented to the court in time; and the same was said of an innocent neutral carrier, the goods having been transshipped in a foreign port.<sup>3</sup>

Where vessels were seized in port preparatory to hostilities against the country to which they belonged, it was held that the freight due went to the crown, on the ground that it had succeeded to the rights of the ship-owners.<sup>4</sup> But the owners were permitted to deduct from the cargo money they had advanced to the master for repairs, it being an advance of freight and not an average.<sup>5</sup>

In cases of capture and restoration of the property captured, it is the general rule that the freight (being made a charge on the cargo) takes precedence of the claim of the captor for his expenses. But it is also said that where the captor is entitled to his expenses, his claim is prior to that of the neutral master for his expenses.<sup>6</sup>

pronounce that the claimant is not as much entitled to the freight as to the vessel." (The captor was held to be liable for the vessel in the same case. 3 Rob. Adm. 129.)

<sup>1</sup> The Twilling Riget, 5 Rob. Adm. 82.

<sup>2</sup> The Dorothy Foster, 6 Rob. Adm. 88. The vessel, in this case, had sailed from a port in the island of Jamaica, and was on her way to another port for the purpose of joining convoy, and it was held that the voyage had commenced within the rule. But it was said that had the vessel been cut out of port and then recaptured, no salvage would have been allowed on the expected freight. It may be questioned, however, how far this distinction comports with the recent doctrine, that the lien for freight exists the moment the goods are put on board.

<sup>3</sup> The Santa Maria, 10 Wheat. 431.

<sup>4</sup> The Prosper, Edw. Adm. 72.

<sup>5</sup> The Constantia Harlessen, Edw. Adm. 232.

<sup>6</sup> In The Bremen Flugge, 4 Rob. Adm. 90, the court held that freight was a

Prize cargoes, sent in for adjudication in a transport chartered by the government, are not chargeable with the payment of freight, or any part of the charter-money, in favor of the owners of the vessel.<sup>1</sup>

lien on the cargo which the captors were obliged to satisfy, as they took the cargo *cum onere*; but that the expenses of the captor took the priority of the expenses of the neutral master. In *The Vrow Henrica*, 4 Rob. Adm. 343, the court expressly sustained the decision in *The Bremen Flugge*. Sir *William Scott* said: "I have considered the cases which I directed to be looked up, and I see no reason to alter the opinion which I before expressed, that freight is, in all ordinary cases, a lien which is to take place of all others. The captor takes *cum onere*. It is the allowed privilege of neutral trade to carry the property of the enemy, subject to its capture, and so the temporary detention of his vessel; and if the party does not prevaricate or conduct himself in any respect with ill faith, he is entitled to his freight. This is the rule I am disposed to apply in all cases of neutral ships carrying on their ordinary commerce."

<sup>1</sup> *The Undaunted*, 2 Sprague, 194.

## CHAPTER VIII.

## OF SALVAGE.

## SECTION I.

## OF THE GENERAL PRINCIPLES OF SALVAGE.

SALVAGE is eminently a subject for admiralty jurisdiction,<sup>1</sup> and we may state, that it has been decided that no action will lie at common law, unless the salvor can prove a contract with the owner of the property saved or with his agent.<sup>2</sup>

If the court of admiralty has jurisdiction over the property, for the purpose of decreeing salvage, it has the power to determine to whom the residue of the property shall be delivered, and may be obliged to decide whether a capture by a foreign nation is valid or not.<sup>3</sup>

The word salvage is used in two senses; it sometimes means the property which is saved from a wrecked vessel, and frequently has this meaning among insurers and in insurance. But in admiralty, and generally in the law merchant, it means the compensation which is earned by persons who voluntarily assist in saving a ship or her cargo from peril; and we use the word in this last sense in this chapter.

The interest of co-salvors is not joint but several; and payment or satisfaction to any one is not so to any other. If, therefore,

<sup>1</sup> See *ante*, p. 177, n. 1.

<sup>2</sup> *Lipson v. Harrison*, Q. B. 1854, 24 Eng. L. & Eq. 208. The sailor in this case, was ordered by his captain to leave his vessel, and go in a boat fourteen miles to the assistance of another vessel which was stranded, and to place himself under the command of the captain of the other vessel. It was held, under these circumstances, that he could not maintain an action against the owner of the ship saved, for his services.

<sup>3</sup> *McDonough v. Dannery*, 3 Dall. 188.

payment is made to the master, although his receipt would bind himself and his owners, and an action would lie against him by the seamen for their shares,<sup>1</sup> yet it is also true, that the seamen may bring an action against the property saved, if the settlement was made with the master without their consent.<sup>2</sup>

The court should not give different parts or parcels of the ship or cargo to different salvors, or different proportions of specific parts;<sup>3</sup> and this, we believe, is never done in this country;<sup>4</sup> but different proportions of, or sums from, the value of the whole property saved. And sometimes a specific sum is given.<sup>5</sup>

A salvor in possession has a qualified property in the thing saved, whether ship or cargo, or both. And it is not necessary that he should remain in actual possession, in order to maintain his rights or preserve this qualified property.<sup>6</sup> Nor should he do so, to the detriment of the property or the inconvenience of the master and crew.<sup>7</sup> Salvors cannot be divested of this legal interest in the property saved, until it is taken from them by adjudication in a court of competent authority.<sup>8</sup> The owner does not lose his right of property by the salvage, but it is qualified by the sal-

<sup>1</sup> *The Centurion*, Ware, 477.

<sup>2</sup> *The Britain*, 1 W. Rob. 40; *The Sarah Jane*, 2 W. Rob. 110. But see 9 & 10 Vict. c. 99, § 26.

<sup>3</sup> *The Vesta*, 2 Hagg. Adm. 189.

<sup>4</sup> The practice in this country is to give a proportion of the value of the property and not a part of the property itself. *Hennessey v. The Versailles*, 1 Curtis, C. C. 363. The power of the court, however, to adjudge the latter is recognized by a *dictum* in *McDonough v. Dannery*, 3 Dall. 188. "Admiralty courts having the thing saved under their control, may either adjudge a portion of such thing to the persons who have saved it, or a sum of money to be paid by the proprietor or from the produce of the thing saved." See also *The Inca*, Swabey, Adm. 370.

<sup>5</sup> *McGinnis v. The Steamboat Pontiac*, 1 Newb. Adm. 180, 5 McLean, C. C. 359.

<sup>6</sup> *The Maria*, Edw. Adm. 175; *The Amethyst*, Daveis, 20; *The Bee*, Ware, 332; *The Brig John Gilpin*, Olcott, Adm. 77; *Eads v. The Steamboat H. D. Bacon*, 1 Newb. Adm. 274; *A Box of Bullion*, 1 Sprague, 57; *The Missouri's Cargo*, 1 Sprague, 260, 272. See *dicta* to the contrary in *Brevoor v. The Fair American*, 1 Pet. Adm. 87, 94; *Packard v. The Sloop Louisa*, 2 Woodb. & M. 48, 58.

<sup>7</sup> See *The Eleanora Charlotta*, 1 Hagg. Adm. 156; *The Lady Worsley*, 2 Spinks, Adm. 253.

<sup>8</sup> *The Blenden Hall*, 1 Doda. 414.

vor's right,<sup>1</sup> and the interest of the owners is sufficient to entitle them to oppose the claim of a co-salvor.<sup>2</sup>

If the amount claimed by salvors is not too great, the master may relieve his property from their lien by paying them at once. If this be done in the honest exercise of a reasonable discretion, he will be justified.<sup>3</sup> If the demand seems to him exorbitant, he cannot turn the salvors off, but should proceed to the nearest and most convenient port where he may have adjudication. And in selecting his port, he must consult their rights and convenience, as well as his own. Otherwise, they may lawfully resist him and determine for themselves the course of the ship. But this power can exist only in an extreme case.<sup>4</sup>

So great is the power of the salvors over a vessel, that it has been held, where a vessel came into collision with another, and all the crew, with the exception of two, escaped on board the other vessel, that a third vessel which fell in with the one thus partly abandoned was not afterwards obliged to delay her course for the purpose of taking on board again the crew of that vessel.<sup>5</sup>

As all salvors may join in one libel, they should so join to save expense; and if different libels are filed unnecessarily, the costs will not be charged to the proceeds of the salvage property.<sup>6</sup> But

<sup>1</sup> *The Bee*, Ware, 332.

<sup>2</sup> *The Blenden Hall*, 1 Dods. 414.

<sup>3</sup> See *Houseman v. Sch. North Carolina*, 15 Pet. 40, 45.

<sup>4</sup> See *The Houthandel*, 1 Spinks, 25. And after a vessel has been brought into port by salvors, her owners have no right to take her to another port, without the consent of the salvors. *The Nicolai Heinrich*, 22 Eng. L. & Eq. 615. Due regard is also to be paid by the salvors to the convenience of the owners, in determining to what port the vessel is to be taken, when the salvage service is performed at sea. *The Eleanora Charlotta*, 1 Hagg. Adm. 156. In the case of *L'Esperance*, 1 Dods. 46, a vessel bound from Dantzic to London struck upon the Lemon and Ower Bank, and was abandoned by her crew. Two days afterwards she was discovered in latitude 53° 17' N., and longitude 2° 24' E. by an English sloop-of-war bound to Heligoland, to which place the wreck was towed. Her papers were not on board, and there were no means of telling to what port she was going. The owners contended that she should have been taken into an English port, but the court held that the salvors were justified in taking her to Heligoland.

<sup>5</sup> *The Orbona*, 1 Spinks, 161.

<sup>6</sup> *The Ship Henry Ewbank*, 1 Sumner, 400; *The Sch. Boston*, 1 Sumner, 328. And in *Hessian v. The Edward Howard*, 1 Newb. Adm. 522, the court said it was the duty of salvors in bringing a suit for salvage, to make all the co-salvors parties, in order in one final decree to do full justice to all concerned.

if the parties stand upon adverse rights, as where the salvage has been partly performed by one vessel and completed by another, each may file a libel.<sup>1</sup> But a claim of the ship-owners for freight, or general average on the property saved, should be made in a separate libel, because this is only a claim on the balance of proceeds after the salvage is paid, and is a claim against the owners of the cargo, with which the salvors may have nothing to do.<sup>2</sup> If the property saved belongs to the same person, the salvors may, by process against a part, enforce their lien upon the whole.<sup>3</sup>

Co-shippers should not interfere by a claim of the proceeds for the benefit of other shippers with whom they have no privity of interest, and from whom they have no authority to represent them.<sup>4</sup>

If a settlement is made with several salvors, and the money paid over to their agent, a salvor who is not included in the settlement is not entitled, either at common law or in England under the statutes of 3 & 4 Vict. c. 65, and 9 & 10 Vict. c. 99, to a monition directing such agent to bring the money into court for distribution among all the salvors.<sup>5</sup>

If a vessel while engaged in performing a salvage service, or while assisting another vessel under circumstances which prevent the assistance from being considered as salvage, unintentionally and unavoidably injures such vessel, she is not liable in damages.<sup>6</sup>

A vessel is not liable for the salvage due from the cargo, nor the cargo for that due from the vessel, but each must pay its own portion.<sup>7</sup>

<sup>1</sup> The Ship *Henry Ewbank*, 1 Sumner, 400, 408. But if separate libels are filed, the actions may be consolidated by the court for its own convenience. The *London Merchant*, 3 Hagg. Adm. 394; *Rich v. Lambert*, 12 How. 347, 353.

<sup>2</sup> The *Sybil*, 4 Wheat. 98.

<sup>3</sup> The *Missouri's Cargo*, 1 Sprague, 260.

<sup>4</sup> *Stratton v. Jarvis*, 8 Pet. 4.

<sup>5</sup> The *Tenth of June*, 29 Eng. L. & Eq. 585.

<sup>6</sup> *Stevens v. The S. W. Downs*, 1 Newb. Adm. 458.

<sup>7</sup> The *Pyrennee*, Brow. & L. Adm. 189.

## SECTION II.

## WHO MAY BE SALVORS.

The salvage services must be performed by persons not bound by their legal duty to render them.<sup>1</sup> And if such salvors perform such service, and all their acts are legal, the law refuses to inquire very carefully into the motives which influence their conduct; although it cannot be doubted that some inquiry of this kind may sometimes be proper, when the court is considering whether any compensation shall be paid, or if any compensation, what.<sup>2</sup>

It has been made a question whether persons forcibly taking possession of a vessel against the will of the master can claim as salvors.<sup>3</sup> But we think it must be obvious and certain that, on the one hand, the master's reluctance or resistance to the saving of the property under his charge should not bar the claims of salvors, but rather enhance them, if their services were necessary, or in all respects meritorious and useful.<sup>4</sup> But, on the other, his opposition would be a circumstance of great weight in determining whether their services were necessary or meritorious.

It is a question of much importance, who may be salvors; or rather, who may not be, because already bound by legal obligation to render the same service. Thus, a crew, generally, cannot claim as salvors of their own ship or cargo; not only because it is their duty to save her, if possible, but because it would be most unwise to tempt them to let the ship and cargo get into a position of extreme danger, that then, by extreme exertion, they might claim salvage.<sup>5</sup>

<sup>1</sup> The *Neptune*, 1 Hagg. Adm. 227, 236. In *The Lady Worsley*, 2 Spinks, Adm. 253, it was held that the commercial agent of the owners of a vessel on a foreign coast could not, by getting the vessel off the rocks when she had been abandoned by her crew, entitle himself to salvage compensation. The vessel in this case was wrecked on the coast of Africa. See *post*, p. 272, n. 5.

<sup>2</sup> In the case of *Le Tigre*, 3 Wash. C. C. 567, a revenue officer, who intended to do merely his official duty, transcended his authority and seized a vessel, whereby she was saved for the owners. It was held that the officer was entitled to salvage, although when he seized it he did it from another motive.

<sup>3</sup> *Clarke v. Brig Dodge Healy*, 4 Wash. C. C. 651.

<sup>4</sup> See *The Jonge Bastiaan*, 5 Rob. Adm. 322; *The Bee*, Ware, 332.

<sup>5</sup> *Miller v. Kelly*, Abbott, Adm. 564. This question was considered at length

This is certainly the general rule, and it will be found that the usual exception to it is, where the contract of the seamen is at an end, either by an abandonment of the ship<sup>1</sup> or by their discharge

by *Curtis, J.*, in the case of *The Sch. John Perkins*, U. S. C. C. Mass., 21 Law Rep. 87, and in the cases of *The Steamer Acorn* and *The Sch. Speedwell*, 21 Law Rep. 99. The learned judge, on p. 93, said: "Though I am not prepared to deny that cases may arise in which the crew may become salvors of the vessel, it is not easy for me to foresee how such a case can arise, while their contract continues in force." The vessels in these cases were enclosed in a field of ice in a storm, and were temporarily deserted by most of their crews, who intended to return when the gale abated. The alleged salvage services consisted, in one instance, in one of the crew cutting the cable of the vessel to avoid an impending collision with a vessel that was adrift, and in the other case, in avoiding a collision by putting out fenders. Under these circumstances, Judge *Ware* decreed salvage, 19 Law Rep. 490, but this decree was reversed in the circuit court, 21 Law Rep. 87. See also *Beane v. The Mayurka*, 2 Curtis, C. C. 72, where it was held that the slipping of a cable by one vessel to prevent a collision, gave no claim to salvage. See also the case of *Mesner v. Suffolk Bank*, U. S. D. C. Mass., 1838, 1 Law Rep. 249, where a claim for salvage of property on board, by one of the crew of a vessel which was sinking by reason of injuries received by a collision, was refused, although the circumstances of the case, as Mr. Justice *Curtis* remarks, in the case of *The John Perkins*, *supra*, "would seem to have involved all the considerations in favor of the claim of one of the ship's company to be a salvor, which could well be presented." In *The Star*, Vice-admiralty court, Halifax, 14 Law Rep. 487, two vessels came into collision, and got entangled together by their rigging. All the persons on board *The Star*, fearing she would sink, went on board the other vessel, soon after the two vessels came into collision. Shortly after this, some of the crew of *The Star* returned to their vessel, while the vessels were still entangled, and while they were on board the vessels parted and they reached port in safety. The court held that as the crew did not leave their vessel *animo non revertendi*, their services in bringing the vessel in were done under their contract as seamen, and that they were not entitled to salvage. See also *The Holder Borden*, 1 Sprague, 144, cited in note, *infra*.

<sup>1</sup> If a ship be abandoned at sea, and deserted by all her crew except one or two, and these remain on board and save, or help materially in saving the property, they are salvors. *Mason v. Ship Blaireau*, 2 Cranch, 240. The decision in this case proceeded entirely on the ground that by the abandonment of the vessel by the captain and crew, the duty of the mariner who had been left on board by accident ceased. In *The Florence*, Eng. Adm. 1853, 20 Eng. L. & Eq. 607, it was held that if a vessel is abandoned at sea *sine animo revertendi*, the contract of the crew is at an end; and if they afterwards succeed in saving the vessel, they are entitled to compensation as salvors. The learned judge said, however, that he confined his decision to the case of an abandonment at sea, and did not intend that it should apply to leaving the ship on the coast, where there might exist a fair intention of returning. See *Taylor v. Ship Cato*, 1 Pet. Adm. 48. In *The*



by the master,<sup>1</sup> or where the service is so entirely out of the line of their ordinary duty that it may be considered as not done under their contract.<sup>2</sup>

Sch. Triumph, 1 Sprague, 428, a vessel bound for Boston, while off Cape Cod came into collision with another vessel and was considerably damaged. All of the crew left but one. Held, he was entitled to salvage for his subsequent efforts in saving the vessel, although he was left on board against his will. See also next note. In *Montgomery v. The T. P. Leathers*, 1 Newb. Adm. 421, it was held that where a steamboat which was on fire was surrendered by the captain to the master of another boat, the contract of a pilot on board was dissolved, and he might be a salvor.

<sup>1</sup> In *The Warrior*, Lush. Adm. 476, a ship by accident in calm weather went on a rocky beach in the Canary Islands, and soon filled with water, and the master and crew went on shore. The next day the master discharged all the officers and crew, and on the same day some of the crew at the suggestion of the mate returned to the ship, worked for several days and saved the stores and part of the cargo before the ship broke up. Held, that as the mate and crew did not leave *sine spe recuperandi*, there was no abandonment, but that as the officers and crew had been discharged they were entitled to salvage, even if the master acted wrongfully, as there was no evidence that the crew acted fraudulently in accepting the discharge.

<sup>2</sup> Thus, in the case of *The Mary Hale*, decided in 1856, Marvin on Salvage, 161, the vessel was wrecked, and the mate and four seamen crossed the Gulf Stream in an open boat, a distance of one hundred and eighty miles, to procure assistance to take off the passengers and cargo. They succeeded in their endeavors and were the means of saving the passengers and cargo. The court held that they were entitled to salvage, on the ground that their services exceeded the duty they owed to the ship. In the case of *The Holder Borden*, 1 Sprague, 144, the vessel, on a whaling voyage, was wrecked near an island in the Pacific Ocean, which was uninhabited and at a great distance from any other land. The crew rescued part of the oil from the wreck and placed it on the island, and it afterwards came to a place of safety. It was held that the crew were not entitled to compensation as salvors. The master and crew, as a means of escape from the island, built a schooner of thirty-seven tons burden out of the remnants of the wrecked ship. It was held that the remnants were rightfully so used, and that the schooner was the property of the master and crew who built her. The cables and anchors of the wrecked ship and part of the oil were taken to Oahu in the schooner. It was held that the master and crew as owners of the schooner were entitled to compensation for such transportation. In *Reed v. Hussey*, Blatchf. & H. Adm. 543, the crew of a whaling vessel which had been wrecked claimed salvage. Judge Betts said: "The rule seems to be invariable, however, that seamen who are compensated by a share of the freight or of the proceeds of the voyage, cannot in case of wreck claim for salvage service. The only extra compensation they can demand is to be paid by the day for the time they are engaged in saving the wreck." Two dollars a day were allowed each of the crew, though the

And where a vessel is in a position of great danger, and a person from another vessel is requested by the owner to take the command as captain, and save the vessel if he can, he is to be considered as a salvor, if no specific agreement is made with him for compensation.<sup>1</sup>

A crew is bound to suppress a mutiny on board their own ship, at all events and at every hazard, and cannot claim salvage therefor,<sup>2</sup> although an admiralty court, where it could, would be disposed to reward seamen for meritorious conduct of this kind; and if a crew of one ship suppress a mutiny or revolt in another ship, or retake it from mutineers or revolters, this may well found a claim for salvage.<sup>3</sup>

If part of a crew leave their ship and go on board another to save it, and thereby acquire a salvage claim, the rest, who remain, share in this claim. Not equally, however; for their claim rests mainly on the increased labor, exposure or peril which falls on them. If they were as willing to go as those who went, then they are entitled to more, in proportion, than if they hung back, and they who actually performed the service were the only ones ready to make the effort or encounter the peril.<sup>4</sup> But it has been held

wages of other laborers were sixty-two and a half cents a day, and others might have been hired at this price. In *Montgomery v. Tyson*, U. S. D. C. Mass., *Lowell, J.*, a *per diem* compensation was also allowed, the master having promised the men day's wages if they would work.

<sup>1</sup> *McGinnis v. The Steamboat Pontiac*, 1 Newb. Adm. 130, 5 McLean, C. C. 359. The libellant in this case, took charge of the vessel while she was in a position of danger in the ice, on the Ohio river. The court admitted the propriety of the general rule that a passenger cannot be a salvor, but held that it could not apply, as the libellant was passenger on board of another boat, and could have had no agency in bringing the *Pontiac* into the position of danger in which she was placed.

<sup>2</sup> *The Governor Raffles*, 2 Dods. 14.

<sup>3</sup> *The Trelawney*, 4 Rob. Adm. 223.

<sup>4</sup> *The Mountaineer*, 2 W. Rob. 7; *The Centurion*, Ware, 477, 483. In *The Baltimore*, 2 Dods. 132, equal salvage was decreed to those who went on board the vessel saved, and to those who remained but were willing to go; and to one who was not willing to go, nothing was given. But it is manifest that as every salvor must be rewarded according to the labor and peril he undergoes, those who leave their own ship should generally be entitled to more than those who remain. See *The Jane*, 2 Hagg. Adm. 338; *The Sarah Jane*, 2 W. Rob. 110, 115; *The Ship Henry Ewbank*, 1 Sumner, 400, 431; *The Roe*, Swabey, Adm. 84; *The Janet Mitchell*, 1 Swabey, Adm. 111; *The Charles Henry*, 1 Bened. Adm. 8.

that only those of the crew of a light-ship who actually perform a salvage service are entitled to compensation.<sup>1</sup>

If the crew of a ship which has been wrecked, and who are now on board another ship as passengers, as a part of the crew of this ship render salvage services to a third ship and property, they are entitled to a share of the salvage.<sup>2</sup>

So it would doubtless be with passengers of any description ;<sup>3</sup> but a passenger is not, it has been held, allowed any salvage for services rendered to the ship in which he is, because that is his duty.<sup>4</sup> It is obvious, however, that while this may be generally true, yet, as in the case of a seaman, extraordinary services may give a salvage claim, and certainly the passenger would not be held as bound to all the duty of a seaman ;<sup>5</sup> and if his relation as

<sup>1</sup> The Emma, 3 W. Rob. 151.

<sup>2</sup> The Salacia, 2 Hagg. Adm. 262, 269. In The Two Friends, 2 W. Rob. 349, occurred the curious case of two vessels being abandoned by their crews at sea, and the crew of the first finding the second vessel and saving her. The court considered that as they thereby saved their own lives, it was a case of mutual benefit, and, the property being worth £ 1,237, decreed £ 300.

<sup>3</sup> Bond v. The Brig Cora, 2 Wash. C. C. 80; McGinnis v. The Steamboat Pontiac, 1 Newb. Adm. 130, 5 McLean, C. C. 559; The Charles Henry, 1 Bened. Adm. 8; Smith v. The Stewart, Crabbe, 220. In The Hope, 3 Hagg. Adm. 423, compensation was allowed to the passengers, on the ground that "they were delayed and experienced some inconvenience."

<sup>4</sup> In The Branston, 2 Hagg. Adm. 3, note, salvage was refused in a case where a passenger on board, a lieutenant in the royal navy, contributed his assistance when the vessel was in distress. In The Vrede, Lush. Adm. 322, a ship was injured by a collision, and two hours afterwards was taken in tow by a steam-tug. The passengers both before and after the vessel was taken in tow worked at the pumps. Held, that they were not entitled to salvage.

<sup>5</sup> Newman v. Walters, 3 B. & P. 612. In this case the ship was in danger, and the captain and part of the crew left her. A passenger who had been a sea-captain took the command, and, with the aid of the rest of the crew, brought the vessel safely into port. Held, that he was entitled to claim salvage. In The Great Eastern, U. S. D. C. New York, *Shipman, J.*, 1864, this question was elaborately considered and a passenger allowed salvage. The following extracts from the opinion of the learned judge show the nature of the case:—

"The authorities cited show that officers and crew, pilots and passengers may all become salvors when they perform services to the ship in distress, beyond the line of their duty. The duties of passengers are much more circumscribed than those of sailors or pilots; and it would seem that all the law imposes upon them is to assist in the ordinary manual labor of working and pumping the ship, under the direction of those in command of her. If they assume extraordinary responsi-

passenger to the ship is dissolved, he may then perform a salvage service.<sup>1</sup>

A pilot, acting within the line of his duty, cannot entitle himself to claim as salvor, by any exertions or any service as pilot, although he may become, like any other person, a salvor, if he performs extraordinary services outside of the line of his duty. And if persons assume the character of pilots, and act as such,

bilities, and devise original and independent means by which the ship is saved, after her officers have proved themselves powerless, I see no reason, and know of no authority that can prohibit them from being considered as salvors. I think it follows, from the principles laid down by the authorities,

"1. That a passenger on board a ship can render salvage service to that ship when at distress at sea.

"2. That in order to do this he need not be first personally disconnected from the ship; but,

"3. That these services, in order to constitute him a salvor, must be of an extraordinary character and beyond the line of his duty, and not mere ordinary services, such as pumping and aiding in working the ship by usual and well-known means.

"That the services of the libellant in the present case were of an unusual character cannot be denied. After the officers of the ship had exhausted their means of getting control of the rudder, he devised, and with the aid of a large number of men put under his directions by the captain, executed a plan which, in the judgment of this court was the efficient means of rescuing this great vessel from peril. The whole work of accomplishing this result was entrusted to him and to his directions. If it is said that he got his main idea of the plan he carried out from witnessing an experiment of the engineer, which I doubt, still the effort of that officer had entirely failed, and was an abandoned experiment. The merit of the libellant in overcoming the obstacles which had proved insurmountable to the engineer, is, in my judgment, enhanced rather than diminished by the unsuccessful effort of the latter. That the service rendered by the libellant was a very difficult one, is proved by the fact that the able and experienced officers of this ship had failed to accomplish the result which he finally secured. They had spent two days of fruitless effort, though stimulated by motives as powerful as can be addressed to the minds of men. It required no little moral courage for this libellant to interpose to arrest the unscrewing of the nut on the rudder shaft, and then assume the responsibility of a new and different experiment, which would consume precious time, and might thus produce appalling consequences. Had he failed, the consequences to him would have been injurious and humiliating. The whole circumstances of the case are so extraordinary as to leave no doubt in my mind that the services which he performed were wholly beyond his duty as a passenger, and therefore entitle him to salvage compensation."

<sup>1</sup> The Two Friends, 1 Rob. Adm. 271, 285; Clayton v. Ship Harmony, 1 Pet. Adm. 70.

they must be compensated as such, and not as salvors.<sup>1</sup> In England, it would appear that formerly extra efforts and exertions on the part of pilots were compensated as such, and not as salvage.<sup>2</sup> Now, however, pilotage is defined to be "the conducting a vessel into port in the ordinary and common course of navigation," and it is said not to be simple pilotage "when a vessel, from real danger, or from what may afterwards turn out to be an unfounded alarm is, seeking a port of safety, out of the course of her intended voyage."<sup>3</sup> And as the English pilot laws do not provide for any extra compensation, the courts have felt themselves bound to reward all efforts beyond the duty of a pilot, by compensation as salvage.<sup>4</sup> And it has been held that when pilotage services are voluntarily performed by persons who are not pilots, in a place where there are no licensed pilots, they are to be compensated for as salvage.<sup>5</sup>

<sup>1</sup> *The Cumberland*, 9 Jurist, 191; *The Johannes*, 6 Notes of Cases, 288. In *The City of Edinburgh*, 2 Hagg. Adm. 333, the vessel was off the coast in a storm two days, with a signal for a pilot flying. None, however, went to her till the third day, after the storm had abated. They then claimed salvage on the ground that they had signalled the captain to go back on his first entering the harbor, on the first day of the storm, that they had continued on the watch for two nights, and had been prevented from going off only by the violence of the storm. The Trinity Masters being of the opinion that the attempt to go to the vessel should have been made, the court held that no salvage service had been rendered. In *The Jonge Andries*, Swabey, Adm. 226, 229, Dr. *Lushington* considered the law to be that if a pilot went on board a vessel in distress he might claim as salvor, but that if he were engaged to take the vessel into port he could not claim additional compensation, if, in consequence of the weather becoming more boisterous, he should perform additional services. This case was affirmed on appeal, Swabey, Adm. 303.

<sup>2</sup> *The Enterprise*, and *The Columbus*, 2 Hagg. Adm. 178, note, decided in 1828. In *The Funchal*, 3 Hagg. Adm. 386, note, where three smacks piloted a vessel out of an unfrequented channel at the mouth of the Thames to the Nore, on a moonlight night, the vessel being uninjured and preparing to anchor, knowing her situation, it was held that this was a mere pilotage service. See also *The Branken Moor*, 3 Hagg. Adm. 373.

<sup>3</sup> *The Elizabeth*, 8 Jurist, 365. See also cases in next note.

<sup>4</sup> *The Frederick*, 1 W. Rob. 16; *The Hebe*, 2 W. Rob. 246; *The Joseph Harvey*, 1 Rob. Adm. 306; *The Elizabeth*, 8 Jurist, 365; *The Persia*, 1 Spinks, 166; *The Industry*, 3 Hagg. Adm. 203, where it is held to be no part of the duty of a pilot to tow a vessel. In *The King Oscar*, 6 Notes of Cases, 284, and in *The Hedwig*, 1 Spinks, 19, 24 Eng. L. & Eq. 582, the general doctrine was applied to a foreign vessel.

<sup>5</sup> *The Rosehaugh*, 1 Spinks, 267.

But we should not consider that this would be so if an agreement was made to act as pilot.<sup>1</sup>

In this country, as we have previously remarked,<sup>2</sup> the States are authorized by an act of Congress to make their own pilotage laws, and questions under these laws are cognizable both in the State and in the United States courts. Most of these laws make it part of the duty of a pilot to assist vessels in distress, and either give the rate of the extra compensation to be awarded, or point out the tribunal which shall determine the amount due. Extra services are, therefore, in this country generally considered as such, and not as salvage services,<sup>3</sup> and this has been so held even where there is no statute law applicable to the case.<sup>4</sup>

In some cases, however, extra services have been considered as salvage,<sup>5</sup> even though the pilot could have recovered his extra compensation under a State statute.<sup>6</sup> If a vessel is in such peril

<sup>1</sup> See *The Jonge Andries*, Swabey, Adm. 226, affirmed on appeal, Swabey, Adm. 303.

<sup>2</sup> See *ante*, p. 107.

<sup>3</sup> *Dulany v. Sloop Peragio*, Bee, 212; *Dexter v. The Bark Richmond*, 4 Law Rep. 20; *Schooner Wave v. Hyer*, 2 Paine, C. C. 131. And in *Callagan v. Hallett*, 1 Caines, 104, where the vessel was on shore, and the master made an agreement with a pilot to get her off for \$ 500, and take her into port, the court refused to enforce it, on the ground that the pilot was bound to render assistance, and could recover an adequate compensation in the manner pointed out by the statute.

<sup>4</sup> *Love v. Hinckley*, Abbott, Adm. 436.

<sup>5</sup> *Hand v. The Elvira*, Gilpin, 60; *The Brig Susan*, 1 Sprague, 499.

<sup>6</sup> *Hobart v. Drogan*, 10 Pet. 108. In New York some importance seems to be attached to the question, whether the vessel is afloat at the time of the service rendered. Thus in *Lea v. Ship Alexander*, 2 Paine, C. C. 466, it was held that where a vessel is on a shoal and is got off by a pilot, he is entitled to claim salvage, on the ground that it is not in the line of the duty of a pilot to do more than navigate a vessel when she is afloat. For no other reason could salvage have been refused in the case of *Schooner Wave v. Hyer*, 2 Paine, C. C. 131. In this case the vessel while going out of the harbor in winter was injured by the ice, and when near Sandy Hook was nearly full of water. She was saved by the exertions of a pilot-boat which was bound in. The court held that this was not a case of salvage, but of pilotage only. And in *Hope v. Brig Dido*, 2 Paine, C. C. 243, where a vessel was met with at sea without a rudder, it was held, that if she was thereby rendered innavigable, it was a salvage service, but not otherwise; and it was said that before pilots can be salvors they must discharge their duties as pilots, and there must be efforts, perils to be encountered, and labor and skill out of the line of their duty.

as to be the subject of salvage service, and a signal is hoisted, it will be deemed a request for assistance, although it be the usual signal for a pilot.<sup>1</sup>

An officer of the customs who renders extraordinary assistance, outside the bounds of his official duty, may claim as salvor;<sup>2</sup> and so may a magistrate, under similar circumstances.<sup>3</sup> And the agent of Lloyd's,<sup>4</sup> or of American insurance companies, or even one who is the especial agent of the owners, for the very purpose of recovering the ship and cargo, may nevertheless perform services which will make him a salvor.<sup>5</sup> A prize ship in distress, if saved and brought into port by strangers, will be held subject to salvage; and after deducting salvage, the proceeds will be restored to those who were in possession of her.<sup>6</sup>

In a case where salvors, after bringing several kegs of specie to a port of safety, threw one keg overboard feloniously, some fishermen who saw the act, and who afterwards rescued the property, were held entitled to salvage, although the water was only eight feet deep at the place where the keg was.<sup>7</sup>

The officers and crew of our national vessels are so far bound to

<sup>1</sup> The *Hedwig*, 1 Spinks, 19, 24 Eng. L. & Eq. 582; The *Brig Susan*, 1 Sprague, 499. See *post*, p. 308, n. 3.

<sup>2</sup> *Le Tigre*, 3 Wash. C. C. 567. *Washington, J.*, in this case said: "We have no doubt, that if a collector, or other revenue officer, intending to act in the line of his official duty, but mistaking the law and transcending his authority, is the meritorious cause of saving property to the owner, he is not precluded on account of the motive which actuated him, from claiming salvage."

<sup>3</sup> See the case cited by Dr. *Lushington*, in The *Purissima Concepcion*, 3 W. Rob. 181, 184. But in The *Aquila*, 1 Rob. Adm. 37, 46, Sir *W. Scott* held that a magistrate who gave notice of the disaster to the consul of the country to which the vessel belonged, and to Lloyd's, and who administered an oath to fifteen men whom he sent to assist the vessel, was not entitled to claim as salvor.

<sup>4</sup> The *Lord Cranstoun*, cited 2 Hagg. Adm. 207; The *Purissima Concepcion*, 3 W. Rob. 181. But see The *Lively*, 3 W. Rob. 64. The case of The *Purissima Concepcion* came before the court again, 7 Notes of Cases, 503, and the learned judge said that the case must not be taken as a precedent; and only a small amount was allowed. In The *Traveller*, 3 Hagg. Adm. 370, where assistance was rendered to a vessel by a steamer belonging to Lloyd's agent, the court said that circumstance would not affect the claim.

<sup>5</sup> The *Happy Return*, 2 Hagg. Adm. 198; The *Favorite*, 2 W. Rob. 255, 259; The *Cargo ex Honor*, Law Rep. 1 Adm. 87. See p. 264, n. 1.

<sup>6</sup> *Booth v. Sch. L'Esperanza*, Bee, 92.

<sup>7</sup> The *Mulhouse*, U. S. D. C. Florida, *Marvin, J.*, 22 Law Rep. 276.

rescue a vessel from mutineers, that they are not entitled to claim salvage for such a service,<sup>1</sup> unless, perhaps, where they incur great personal danger and use great exertions in the performance of the service. But for an ordinary salvage service they are clearly entitled to compensation.<sup>2</sup> But as their time and the property which they subject to risk belong to government, their compensation is less than it would otherwise be;<sup>3</sup> and the government is allowed for the pay, victualling, and wear and tear of the ship, while employed in a salvage service.<sup>4</sup>

In England, the right of its vessels of war to sue as salvors, except in certain instances, is taken away by statute, unless the admiralty gives its consent.<sup>5</sup> But in this country, although it is very unusual for our ships of war to claim salvage, we know of no law which would prevent them from so doing.<sup>6</sup> So in respect

<sup>1</sup> *The Francis & Eliza*, 2 Dods. 115. But see *United States v. The Amistad*, 15 Pet. 518.

<sup>2</sup> *The Lord Nelson*, Edw. Adm. 79; *The Pensamento Feliz*, Edw. Adm. 115; *The Gage*, 6 Rob. Adm. 273; *The Louisa*, 1 Dods. 317; *The Mary Ann*, 1 Hagg. Adm. 158; *The Thetis*, 3 Hagg. Adm. 14; *The Elwell Grove*, id. 209; *L'Esperance*, 1 Dods. 46; *The Wilsons*, 1 W. Rob. 172; *The Iodine*, 3 Notes of Cases, 140; *The Charlotte Wylie*, 2 W. Rob. 495. In *Robson v. The Huntress*, 2 Wallace, C. C. 59, a salvage service performed by an English man-of-war to an American brig on the coast of Africa, was compensated for. In *The Lustre*, 3 Hagg. Adm. 154, the use of a government steamer was allowed by the admiral, "upon the express stipulation and condition that the owners and underwriters would be answerable for the payment of the stores expended or damaged." It was held that this agreement did not bar the right of the officers and crew to salvage compensation. In *The Rosalie*, 1 Spinks, 188, 25 Eng. L. & Eq. 605, which was probably the last case in England on this subject prior to the statute, referred to *infra*, Dr. *Lushington* expressed himself to be strongly in favor of allowing national vessels to claim as salvors.

<sup>3</sup> *The Clifton*, 3 Hagg. Adm. 117; *The Rapid*, id. 419; *The Mulhouse*, U. S. D. C. Florida, *Marvin*, J., 22 Law Rep. 290.

<sup>4</sup> *The Thetis*, 3 Hagg. Adm. 14.

<sup>5</sup> Merchants' Shipping Act of 1854, 17 & 18 Vict. c. 104, § 484, *et seq.* The court took jurisdiction under this act, with the consent of the Lords of the Admiralty, in the cases of *The Earl of Eglinton*, Swabey, Adm. 7; *The Mary Pleasants*, Swabey, Adm. 224; and *The Alma*, Lush. Adm. 378.

<sup>6</sup> The Act of Dec. 22, 1837, c. 1, § 5 U. S. Stats. at Large, 208, authorizes the President to cause a suitable number of public vessels to cruise upon the coast in the severe portion of the season, to afford aid to vessels in distress. While engaged in such a service we presume that they would not be entitled to claim any extra compensation; but we know of no law that would prevent their acting as



to the coast guard in England. It is appointed to protect the revenue and to prevent smuggling, and, although paid by the public, yet the persons who compose it have a clear right to salvage compensation if they perform salvage services.<sup>1</sup>

It has been said that effective services by steamboats should be

salvors at any other time. This question has been several times considered by the attorneys-general of the United States, and opinions have been given to the following effect. In 1824, Mr. *Wirt* gave an opinion that a United States vessel was not entitled as against government to salvage for saving property of the United States, wrecked on Florida reef. 1 Attorney-Gen. Opin. 675. In 1849, Mr. *Reverdy Johnson* gave an opinion in favor of the right of an American vessel of war to claim salvage for assisting a French ship. 5 Attorney-Gen. Opin. 116. In 1856, the question was presented to Mr. *Caleb Cushing*, whether the officers and crew of a coast-survey steamer had any right to receive and retain for their own use salvage for assistance rendered to a merchant vessel of the United States. This learned jurist doubted whether any compensation could be granted without the consent of the executive. This doubt was founded on the language of Mr. Justice *Story* in the case of *United States v. The Amistad*, 15 Pet. 518, 597, which was: "As to the claim of Lieutenant Gedney for the salvage service, it is understood that the United States do not now desire to interpose any obstacle to the allowance of it, if it is deemed reasonable by the court." The opinion was also given to the secretary of the treasury, that he might by standing regulations forbid the demand of salvage by any public ship under the orders of the Treasury Department. 7 Attorney-Gen. Opin. 756. In 1851, in the case of *The Josephine*, 2 Blatchf. C. C. 322, Mr. Justice *Nelson* was of the opinion that cases might exist in which seamen on board a man-of-war might claim salvage, notwithstanding general instructions to the contrary from the government; but held that, "In such cases, something more than the usual peril should be encountered by the officers and crew, and an extraordinary service should be rendered, exceeding the duty imposed upon them by their employment in the public service and the special instructions of the government on the subject. Ordinary service in rescuing American vessels in distress, requiring no great hardship or peril on the part of the officers and crew, would seem to fall directly within the line of the general duty thus enjoined. It is a service bestowed by the government for the protection and encouragement of its commercial marine, and the right to impose this duty on government vessels is too clear to be controverted. Great and extraordinary service and peril in rescuing a vessel and her cargo would present a different question, and stand upon different principles and policy. Such acts should of themselves be the subject of reward and encouragement, and would not be necessarily comprehended in the duty resulting from the public employment of the persons rendering it, or from the instructions of the government." It may also be remarked, that by a United States statute, as we shall see hereafter, salvage is allowed national vessels for recapturing property of the United States.

<sup>1</sup> *The Ocean*, Eng. Adm. 1838, 2 Monthly Law Magazine, 441; *Silver Bullion*, 2 Spinks, 70.

particularly encouraged; and one obvious reason for this would be, that it is wise to offer a particular inducement to those whose services might often be particularly useful from their comparative independence of wind and tide.<sup>1</sup> If the service is merely one of ordinary towage, as a general rule, only the usual towage compensation is to be given.<sup>2</sup> But if a vessel is in distress, and in such a condition that a salvage service can be performed, a sailing vessel may earn salvage by towing,<sup>3</sup> and it is no less a salvage service when performed by a steamer because she can do it with more safety to herself than a sailing vessel could.<sup>4</sup>

Where there is an agreement to tow a disabled vessel from one place to another, for an extra compensation, the court will not increase the sum agreed upon because of some additional assistance rendered.<sup>5</sup> But where some material circumstance is con-

<sup>1</sup> *The Raikes*, 1 Hagg. Adm. 246, decided in 1824. This is said to be the first case in which a steam vessel claimed salvage. See also *The Alfen*, Swabey, Adm. 189; *Brooks v. The Wm. Penn*, U. S. C. C. South Carolina, 1 Am. Law Reg. 584.

<sup>2</sup> *The Princess Alice*, 3 W. Rob. 138; *The Harbinger*, 20 Eng. L. & Eq. 641; *The Albion*, 2 Hagg. Adm. 180, note. Where a steam-tug goes out of port for the express purpose of towing a particular vessel in, under circumstances which make it a mere towage service, it seems that the expense and time of going out are to be compensated for as well as the actual labor of towage. *The Graces*, 2 W. Rob. 294. In *The Red Rover*, 3 W. Rob. 150, a fishing vessel was struck by a flaw of wind, and her masts blown overboard. The weather afterwards being fine, she was towed by another fishing smack into a port of safety. The court considered it a salvage service, but of so trivial a nature that only five pounds, without costs, were awarded. The value of the vessel was £100. See *The Batavier*, 1 Spinks, 169.

<sup>3</sup> *The Harriet*, 1 Spinks, 180.

<sup>4</sup> *The United Kingdom*, 3 Hagg. Adm. 401, note; *The London Merchant*, id. 394; *The Meg Merrilies*, id. 346; *The Traveller*, id. 370; *The Earl Grey*, id. 363; *The Isabella*, id. 427; *The Reward*, 1 W. Rob. 174, 177; *The Kilby*, 26 Eng. L. & Eq. 596, note; *The Kingalock*, 1 Spinks, 263, 26 Eng. L. & Eq. 596; *The Medora*, 1 Spinks, 17; *The Charles Adolphe*, Swabey, Adm. 152; *The Paris*, 1 Spinks, 289; *The Martin Luther*, Swabey, Adm. 287; *The Saint Nicholas*, Lush. Adm. 29; *The Ellora*, id. 550; *Hennessey v. Ship Versailles*, 1 Curtis, C. C. 353; *The Independence*, 2 Curtis, C. C. 350; *The H. B. Foster*, Abbott, Adm. 222; *Virden v. The Brig Caroline*, U. S. C. C. Del., 1857, 6 Am. Law Reg. 222; *The Wm. L. Garrison*, U. S. D. C. Mass., 1867, *Lowell*, J.; *The George Gilchrist*, March, 1868, Same Court; *The Coringa*, Same Court; *The Acacia*, Same Court; *The Joseph C. Griggs*, 1 Bened. Adm. 80.

<sup>5</sup> *The Kilby*, 26 Eng. L. & Eq. 596, note; *The Betsey*, 2 W. Rob. 167. It was also held in this latter case that "whoever takes upon himself to establish the

ceased,<sup>1</sup> or where an ordinary towage service is commenced at an agreed sum, and an extraordinary service is rendered, the agreement is set aside.<sup>2</sup>

If a towage service is commenced by a steam-tug, which breaks down in the progress of the service, and the towage is completed by other tugs belonging to the same company, the original contract is not annulled, and it seems that the acceptance of the service by the master of the vessel in tow is a continuation of the original

fact that an admitted agreement has been invalidated by consent of parties, is bound to prove, by clear preponderance of testimony, that it was so cancelled."

<sup>1</sup> *The Kingalock*, 1 Spinks, 263, 26 Eng. L. & Eq. 596. In this case the agreement was set aside because the master of the vessel saved omitted to state that he had just lost an anchor and cable. But in *The Jonge Andries*, Swabey, Adm. 226, the court held that the master was not bound to point out every circumstance that had occurred during the voyage, but that there must be a concealment on purpose, of a circumstance of importance, to have this effect. This case was affirmed on appeal in the Privy Council, Swabey, Adm. 303. In *The Canova*, Law Rep. 1 Adm. 54, the fact that the greater part of the crew were sick, and that this fact was withheld, was considered not to avoid an agreement of towage, the vessel being in no danger. The value of the property saved has nothing to do with the question whether the agreement is binding or not; and Dr. *Lushington* in one case said: "Salvors are not entitled to make an agreement upon any other grounds than these: The extent of danger to which the property to be salvaged is exposed, the degree of labor they will have to undergo, the risk to which they themselves may be exposed, and the length of time to be occupied; but they are not to speculate on the value of the cargo." *The Henry*, 2 Eng. L. & Eq. 564.

<sup>2</sup> *The William Brandt*, 2 Notes of Cases, Supp. lxvii.; *The Albion*, Lush. Adm. 282; *The Saratoga*, id. 318; *The Minnehaha*, id. 335; *The Annapolis*, id. 355; *The Lady Egidia*, id. 513; *The Edward Hawkins*, id. 515; *The Pericles*, Brow. & L. Adm. 80; *The White Star*, Law Rep. 1 Adm. 68. In *The Galatea*, Swabey, Adm. 349, a steam-tug was hired to tow a brig from Gravesend to the North Foreland for a fixed sum. While on the voyage, a gale having sprung up, the tow rope broke and the brig drifted towards a sand-bank. She let go an anchor but it was alleged by the salvors that she was in considerable danger of striking the sand. She was finally got clear by the tug, and the brig being unable to proceed to the North Foreland was towed back to London. Held, a salvage service. Dr. *Lushington* said, "I have no doubt as to the principle which ought to govern the court in deciding the present case. When an engagement is made for a steamer to tow a ship from one place to another, the steamer is bound by that engagement to do all that is necessary to facilitate the safe voyage of the ship from the one place to the other; and she is to take the chance of bad weather, which may occasion delay and inconvenience. But she does not take the chance of the undertaking being entirely interrupted by the act of God; that is, from the state of the wind and weather being such as to compel her to abandon the orig-

contract.<sup>1</sup> Where a vessel at sea was met by a fishing smack, and an agreement entered into to pilot the vessel into port, and "to sail ahead" of her for an agreed sum, the court held that more than the agreed sum could not be claimed, although the smack was obliged to tow the vessel.<sup>2</sup>

If a vessel is lying in a dock, and is in danger of catching fire from the buildings on the wharf, and is towed thence by a steam-tug, this is a salvage service.<sup>3</sup> Where a vessel at anchor was in danger of being run into by a vessel which was adrift, and a steam-tug made fast to the vessel adrift, and thus avoided the collision, it was held that the service was too indirectly rendered to the vessel at anchor to render her liable for salvage.<sup>4</sup>

As a general rule, none can claim salvage who did not directly aid and participate in the salvage service, or promote those services by doing the work of those rendering them.<sup>5</sup> An exception,

inal undertaking. In the present case there was an undertaking for the steamer to tow the brig proceeded against from Gravesend to the North Foreland, and when off the Tongue Sand, the prosecution of that undertaking was rendered absolutely impossible from the state of wind and weather. The original engagement was then, I hold, no longer binding on the steamer, and I think that she could not be required to tow her back to London, as a part of the towage service, instead of proceeding as originally intended to the North Foreland."

<sup>1</sup> The Lady Flora Hastings, 3 W. Rob. 118.

<sup>2</sup> The Jonge Andries, Swabey, Adm. 226, affirmed on appeal, Swabey, Adm. 303.

<sup>3</sup> The Tees, Lush. Adm. 505. In *Stevens v. The S W. Downs*, 1 Newb. Adm. 458, where a steamboat towed another from the wharf to a place of safety, and thus prevented her from coming in contact with another steamer on fire, which was descending the river, the court said: "While I do not feel myself called upon to decide that this is not a case of marine salvage, I have no hesitation in saying that it is a case where the services performed should entitle the libellants to little more than would be allowed upon a *quantum meruit* for work and labor performed."

<sup>4</sup> The H. M. Hayes, in P. C., Lush. Adm. 375. Dr. Lushington was of a contrary opinion. Lush. Adm. 360.

<sup>5</sup> The Vine, 2 Hagg. Adm. 1. The claim of an officer of the coast guard who permitted his men to render assistance to a vessel, but did nothing himself, was in this case denied. See also *The Charlotte*, 3 W. Rob. 68; *Waterbury v. Myrick*, Blatchf. & H. Adm. 34. And underwriters who employ a vessel to go to the assistance of property which they have insured, are not entitled to claim as salvors. *The Pickwick*, 20 Eng. L. & Eq. 628. The claim of the admiral of a station is refused in case of recapture, unless he has the right by statute. *The Calypso*, 2 Hagg. Adm. 209. See also *The Thetis*, 3 Hagg. Adm. 14, 48, 58, 63.

and a liberal one, is usually made in favor of the owners of the saving vessel, who are not only entitled to claim compensation for stores, etc., supplied, but salvage compensation in addition.<sup>1</sup> But the owner of the cargo has no claim for salvage,<sup>2</sup> unless the stoppage and deviation for the purpose of the salvage were authorized by him.<sup>3</sup> Otherwise, his remedy for any loss caused by the deviation is only against the owner or master.<sup>4</sup>

The lord of a manor cannot claim salvage for taking against the consent of the owner, and preserving parts of a ship thrown up by the sea upon his land, when the servants of the owner are there to take care of the property for him.<sup>5</sup> It does not detract from the merit of a service rendered by salvors, that they acted under the direction of an officer in the navy, who held an official appointment at the place where the service was performed.<sup>6</sup>

It has been said that the charterers of a vessel are not, except under very special circumstances, entitled to the salvage earned

<sup>1</sup> The San Bernado, 1 Rob. Adm. 178; The Jane, 2 Hagg. Adm. 338; The Salacia, id. 262, 264; The Martha, 3 id. 434; The Roe, Swabey, Adm. 84; The Janet Mitchell, id. 111; The Perla, id. 230; Evans v. The Ship Charles, 1 Newb. Adm. 329; The Baltimore, 2 Dods. 132; The Nathaniel Hooper, 3 Sumner, 542. In Waterbury v. Myrick, Blatchf. & H. Adm. 34, the master left the vessel at her outward port, neglected the sale of the cargo belonging to the ship-owner and other shippers, pledged part of the cargo, and with the proceeds hired another vessel and performed a salvage service. The court held that the owners of the vessel were not entitled to participate in the results of this adventure, because their vessel had not been used, and that their remedy against the master for the breach of his duty in selling the cargo was in a court of common law. See also *post*, p. 299.

<sup>2</sup> The Ship Nathaniel Hooper, 3 Sumner, 542; Bond v. Brig Cora, 2 Pet. Adm. 361; Taylor v. Ship Cato, 1 Pet. Adm. 48, 67.

<sup>3</sup> Mason v. Ship Blaireau, 2 Cranch, 240.

<sup>4</sup> The reason given for making a distinction between the owner of the ship and the owner of the cargo, is, that the latter has his remedy in case of a deviation against the owner of the vessel, or against the ship *in rem*, so that although his insurance is forfeited, he incurs no loss, because by the deviation the owner of the ship becomes an insurer. But if the doctrine of Dr. Lushington be correct, that every owner is to be treated as uninsured, there would seem to be no difference between them in this respect. See The Deveron, 1 W. Rob. 180. And as the liability of the owner is now so much limited by statute, it may be a serious question whether the risk of the shipper of goods is not sufficiently great to entitle him to some proportion of the salvage.

<sup>5</sup> Sutton v. Buck, 2 Taunt. 301.

<sup>6</sup> The Persia, 1 Spinks, 166.

by the vessel;<sup>1</sup> but we should consider the rule to be, that if, by the terms of the charter-party, the vessel itself is let to the charterers, they should be considered the owners, and as such entitled to salvage, but not, if the use of the vessel is all they pay for.<sup>2</sup>

And it has been held if a vessel, owned by the person to whom another vessel is chartered, renders assistance to that vessel, and both vessels are under the control of the owner of the saving vessel, he appointing the officers and crew, that no salvage is due, the crews of both vessels being considered as his servants.<sup>3</sup>

The East India Company have been held to pay salvage to a ship which they had chartered and employed, for the salvage service rendered to another ship which was their property. The officers and crew of the chartered ship being appointed by its owner,<sup>4</sup> and not by the East India Company.

If persons are convicted under a statute, in a court of competent jurisdiction for improperly interfering with wrecked property, they cannot maintain a suit in admiralty for their services as salvors.<sup>5</sup>

### SECTION III.

#### OF DIFFERENT SETS OF SALVORS.

Salvors falling into distress and saved by other salvors, do not lose their claim; but their salvors share it with them according to their merit.<sup>6</sup> But a second set of salvors have no right to interfere with the first set, unless there is reasonable ground for the belief that the first salvors alone cannot save the property.<sup>7</sup> If

<sup>1</sup> The *Alfen*, Swabey, Adm. 189. The terms of the charter-party do not very clearly appear in the report of this case.

<sup>2</sup> For the difference between these two modes of hiring, see *ante*, Vol. I. p. 278.

<sup>3</sup> The *Maria Jane*, 1 Eng. L. & Eq. 658.

<sup>4</sup> The *Waterloo*, 2 Dods. 433. See also *The Collier*, Law Rep. 1 Adm. 83; *The Nathaniel Hooper*, 3 Sumner, 575.

<sup>5</sup> The *Wear Packet*, 2 Spinks, 256.

<sup>6</sup> The *Ship Henry Ewbank*, 1 Sumner, 400; *The Jonge Bastiaan*, 5 Rob. Adm. 322. In *The Watt*, 2 W. Rob. 70, a deduction was made from the amount decreed, to compensate for the services of a steamer which completed the salvage service.

<sup>7</sup> *Hand v. The Elvira*, Gilpin, 60; *The Maria*, Edw. Adm. 175; *The Blenden Hall*, 1 Dods. 414; *The Eugene*, 3 Hagg. Adm. 156; *The Samuel*, 4 Eng. L. &

the second set of salvors can show that their services are actually necessary and useful, or that valuable property has been saved by them, which otherwise would probably have been lost, then, we should have no doubt, that the second set had established a salvage claim, even if the first set had opposed and actually resisted their interference.<sup>1</sup>

There is also a distinction of much importance to be noticed in this connection. When a vessel is derelict, the party first taking possession has a vested interest in the property, and no one can

Eq. 581; *A Quantity of Iron*, 2 Sprague, 51. In *The Amethyst*, Daveis, 20, a wreck was discovered by three schooners, just before sunset, and was boarded by one of them. No one, however, remained on board that night, but the three vessels lay by the wreck in order to tow her into port the next morning. At daylight she was about a mile from them, and they proceeded at once to take possession, but before they reached the wreck, she had been boarded by persons from another vessel. These they displaced, and towed the vessel off. Held, that the possession they had taken the night before was of a sufficiently continuing nature, and that the stranger vessel was not entitled to any salvage.

<sup>1</sup> *The Rose in June*, cited 2 Hagg. Adm. 364; *The Charlotta*, 2 Hagg. Adm. 361; *The Effort*, 3 Hagg. Adm. 165; *The Queen Mab*, 3 Hagg. Adm. 242; *The Pickwick*, 20 Eng. L. & Eq. 628. In *The Dosseitei*, 10 Jurist, 865, the vessel was taken by the salvors and anchored in a place of some danger, and left there for several hours, while the salvors went for more ropes and spars, which were necessary. There was a vessel near by which offered to furnish them, and if they had been accepted, the vessel saved might have been taken at once to a place of perfect safety. They were refused, and after some delay the original salvors took the vessel to a port of safety. It did not appear that the delay produced any loss to the vessel, but the court were of the opinion that there was great risk in leaving the vessel at anchor in an exposed situation, and diminished the amount of salvage on that account. The learned judge also stated, that if he thought the refusal to take the ropes, etc., from the other vessel, was for the purpose of preventing it from rendering any assistance, and thus obtaining a larger salvage, he would have refused compensation altogether. See also *The Glory*, Eng. Adm. 1850, 2 Eng. L. & Eq. 551. In this case, a vessel got upon the sands, and the services of a steam-tug were refused by some salvors who had tendered their aid to the vessel. Dr. *Lushington*, on this account, gave the salvors but one third of what they would otherwise have been entitled to. After stating the general rule that salvors cannot interfere with each other, the learned judge said: "I cannot conceive that any notion can be broached, more injurious to the security of the mercantile navy of this country, than a notion that because a man happened first to go aboard a vessel, and then a steam-tug was offered, he had a right to refuse that assistance, and claim to perform the duty himself, because by possibility, a set of salvors might heave a vessel by an anchor, or succeed in getting her off the sand."

interfere with him except in a case of manifest incompetency on his part; but in an ordinary case of disaster, when the master remains in command, it is his province to determine the amount of assistance which is necessary, and the first salvors have no right to prevent other persons from rendering assistance, if the master wishes such aid.<sup>1</sup>

So, unless the vessel is a legal derelict, the salvors have not the right as against the master to the exclusive possession of the vessel, but should, on the master's returning and claiming the charge of the vessel, give it up to him.<sup>2</sup>

If the first set entirely abandon the property, and cease their efforts to save it, and a second and independent set of salvors then take hold, the first set have no right to return and claim priority, and, indeed, have no right to interfere with the second set without necessity.<sup>3</sup> But if the first set, before they left the ship or goods, had materially benefited the same, and made it easier or more practicable to save it, their claims would then, undoubtedly, be allowed to a proper extent.<sup>4</sup> If, however, the first set have, by their carelessness, injured the property, it has been held that they are not entitled to salvage, and that if the second set have rendered efficient service, and are in no way connected with the damage done by the first, they are entitled to salvage, although they sue in the same cause.<sup>5</sup> The better opinion, however, seems to be that as mere carelessness does not forfeit salvage compensation, the first set of salvors may recover compensation so far as their efforts have contributed to the safety of the vessel.<sup>6</sup>

The second salvors cannot lawfully, under any circumstances, make it a condition of their rendering assistance, that the first

<sup>1</sup> The Dantzic Packet, 3 Hagg. Adm. 388; The Black Boy, 3 Hagg. Adm. 386, note; The Glasgow Packet, 2 W. Rob. 307; The Glory, Eng. Adm., 1850, 2 Eng. L. & Eq. 551; The Samuel, 4 Eng. L. & Eq. 581; The Martha, Swabey, Adm. 489.

<sup>2</sup> The Champion, Brow. & L. Adm. 69.

<sup>3</sup> The India, 1 W. Rob. 406.

<sup>4</sup> See The Jonge Bastiaan, 5 Rob. Adm. 322; Cowell v. The Brothers, Bee, 136; The Samuel, 4 Eng. L. & Eq. 581; The Island City, 1 Black, 121, 1 Clifford, C. C. 210, 219, 221; The Underwriter, 4 Blatchf. C. C. 94; The Atlas, Lush. Adm. 518.

<sup>5</sup> The Neptune, 1 W. Rob. 297.

<sup>6</sup> The Atlas, Lush. Adm. 518.



salvors shall abandon their claims to salvage, and any such bargain will be disregarded.<sup>1</sup>

If any persons intrude themselves upon salvors, unnecessarily, and without any sufficient reason, all the services they perform, are held to enure to the benefit of the original salvors.<sup>2</sup> If property is saved by a vessel, and afterwards delivered over to another vessel to be brought into port, the latter vessel does not acquire, by such transfer, any of the rights of the former vessel, as against the property saved.<sup>3</sup>

#### SECTION IV.

##### WHAT AMOUNTS TO A SALVAGE SERVICE.

If the peril encountered be something distinctly beyond ordinary danger, something which exposes the property to destruction unless extraordinary assistance be rendered, it is enough to found a claim for salvage. But if the master can, by a proper use of the means he possesses, save the property, the law presumes that he will, and that the salvors' interference was unnecessary.<sup>4</sup> But

<sup>1</sup> The Ship *Henry Ewbank*, 1 Sumner, 400, per *Story*, J.

<sup>2</sup> The *Blenden Hall*, 1 Dods. 414; The *Fleece*, 3 W. Rob. 278; The *Mary*, 2 Wheat. 123; The *Brig John Gilpin*, Olcott, Adm. 77. See cases *ante*, p. 281, n. 1.

<sup>3</sup> *A Box of Bullion*, 1 Sprague, 57.

<sup>4</sup> *Hand v. The Elvira*, Gilpin, 60, 67; The *Himalaya*, Swabey, Adm. 515. In The *Anastasia*, 1 Bened. Adm. 166, the libellant, who was a free passenger on an Italian brig from Bermuda to New York, alleged that the vessel met with cold weather and adverse winds, and on the twenty-third day, when the provisions and water were getting short, the master, although the vessel was within thirty miles of Liverpool, Nova Scotia, announced his intention of putting back for Bermuda, and that thereupon the libellant took charge of the vessel and carried her into Liverpool. It was also alleged that if this had not been done, the vessel would, in the belief of the libellant, have been lost. Held, that no salvage was due. *Benedict*, J., said: "It will be observed, that the libellant does not claim to have performed any considerable labor or incurred any personal risk, or displayed any extraordinary ability, but his demand is based upon the fact, as he claims it to have been, that he assumed the extraordinary responsibility of overruling the actual master of the vessel, . . . and carrying the vessel into Liverpool without the direction, and contrary to the wishes of her master. That the libellant did this is stoutly denied by the Italian master and crew; but if he did, I cannot under the facts of this case indorse his action to such an extent as to award him

even if the master could save the ship, the salvors may show that he would not have done so. So, if the salvors could have prevented the wreck by timely assistance, but purposely delayed this, they cannot be rewarded as salvors. If the assistance of the salvors is requested by and rendered to the persons in charge of another vessel, they cannot plead that they are not bound to pay for the services rendered, on the ground that the vessel would have been saved if left in her former position.<sup>1</sup>

It is not necessary "that the distress should be actual or immediate, or that the danger should be imminent and absolute; it is sufficient if, at the time the assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered."<sup>2</sup> So, if a vessel is "in a situation of actual apprehension, though not of actual danger."<sup>3</sup>

That the property must be actually saved, and saved by those claiming to be salvors, in order to lay the foundation for salvage claims in admiralty, is quite certain.<sup>4</sup> But this general rule should, we think, be qualified by saying that if the party encounters the danger, and does all he can to save the vessel, and his services tend in some degree to preserve the vessel, compensation will be awarded to him, although the vessel is mainly preserved by other means.<sup>5</sup> A distinction has also been taken be-

a salvage compensation therefor. The vessel had suffered no injury from stress of weather. The allegation that she was short of provisions or water is not sustained by the proofs. The master and crew were in good health, sufficient in number for the ordinary crew of such a vessel; and although their method of navigation would doubtless be far from satisfactory to most American seamen, they were competent, after their fashion and in their own time, to complete their voyage. It is, therefore, not a case where the extraordinary remedy which the libellant claims to have resorted to, was necessary for the salvation of the vessel. It must be a strong case, clearly proved, which would justify a court in commending, by a salvage award, the assumption of such authority and such a responsibility."

<sup>1</sup> *Stevens v. The S. W. Downs*, 1 Newb. Adm. 458.

<sup>2</sup> *The Charlotte*, 3 W. Rob. 68, 71.

<sup>3</sup> *The Raikes*, 1 Hagg. Adm. 246; *The Phantom*, Law Rep. 1 Adm. 58; *The Joseph C. Griggs*, 1 Bened. Adm. 80. See *ante*, p. 277, n. 4.

<sup>4</sup> *Clarke v. Brig Dodge Healy*, 4 Wash. C. C. 651; *The Henry Ewbank*, 1 Sumner, 400, 416; *Montgomery v. The T. P. Leathers*, 1 Newb. Adm. 421, 428; *Emerson v. Proceeds of The Bark Pandora*, 1 Newb. Adm. 438; *The Edward Hawkins*, Lush. Adm. 515.

<sup>5</sup> Thus in *McGinnis v. The Steamboat Pontiac*, 1 Newb. Adm. 130, 5 McLean,

tween salvors who volunteer to go out and salvors who are employed by a ship in distress, and it is said that the former are entitled to nothing if not successful, while the latter are to be paid according to their efforts made, even though the labor and service may not prove beneficial to the vessel.<sup>1</sup>

Salvors who bring the vessel to a position of safety, and then give up the charge to a licensed pilot, are not prejudiced as to their claim by an injury caused by the negligence of the pilot.<sup>2</sup>

It has been laid down as a general rule that evidence of bad weather cannot be admitted to enhance the value of the salvage service.<sup>3</sup> It is, however, admitted by Mr. Justice Story that subsequent perils and storms may enter, as an ingredient, into the case, where they were foreseen, to show the promptitude of the assistance, and the activity and sound judgment with which the business was conducted.<sup>4</sup> And we should be inclined to give even more weight to evidence of this nature. If a vessel is in need of a salvage service, one of the questions is, What was the extent of the peril from which the salvors rescued her? In determining this, the season of the year, the position of the vessel, the state of the weather at the time, and what it might reasonably be expected to be at that time of year, and the chance of relief if the salvors had not

359, a person was requested to take charge of a steamboat which was in the ice, in a position of great danger. He did so, and did all that could be done under the circumstances, and it was held, although the steamboat was saved by the peculiar manner in which the ice broke up, that he was entitled to salvage. In *The Ranger*, 9 Jurist, 119, a vessel negligently got upon the sands. Another vessel saw her, and at much risk crossed a shoal part of the sands and hastened to her assistance, but before she arrived the first vessel got off. The court held that as no actual salvage service was rendered, the vessel could not claim salvage, but as she was induced to go to the assistance of the one on shore to assist her when she was in danger, and as the danger was occasioned by negligence, the vessel was entitled to the expenses she had incurred. In the case of *The Albion*, 3 Hagg. Adm. 254, where a vessel attempted to assist another in towing a wreck, but could not render any assistance, Sir John Nicholl, said: "She is entitled to some remuneration: she has the merit of going to assist, — she showed a willingness, and her offer of assistance was accepted; but it is clear that she impeded the progress of the service." And £100 were allowed, the value being £4,600. See also *The E. U.*, 1 Spinks, 63; *The Santipore*, id. 231. See cases *ante*, p. 281, n. 4.

<sup>1</sup> *The Undaunted*, Lush. Adm. 90.

<sup>2</sup> *The Bomarsund*, Lush. Adm. 77.

<sup>3</sup> *The Emulous*, 1 Sumner, 216.

<sup>4</sup> *Ibid.*

rendered assistance, are all important elements. If the storm occurred during the progress of the salvage service, although after the vessel had been removed from the place where she was most exposed to peril, we should consider that the evidence would be admissible; and so if it were clearly shown that the vessel would have been exposed to the storm if it had not been for the assistance of the salvors.<sup>1</sup>

If the vessel be fraudulently imperilled by the master, this does not defeat the claim of the salvors, unless they were parties to the fraud, or were cognizant of it while it was going on, and did not interfere to prevent it as far as they could, or unless they endeavored to conceal the master's misconduct and screen him from detection.<sup>2</sup>

As it is equally a salvage service, and within admiralty jurisdiction, whether the service be rendered at sea or when the vessel is wrecked on the coast,<sup>3</sup> and whether it be performed by seamen or by landsmen;<sup>4</sup> so in the case where the salvors neglected their

<sup>1</sup> In *The Emulous*, 1 Sumner, 216, a storm took place the day after the vessel reached a port of safety. The salvage service was rendered in the Vineyard Sound, the vessel, being aground on a reef on an island near the coast of Massachusetts. Assistance was procured from the shore, and if the libellants had not performed the service, other persons would. In *The Monkwearmouth*, 9 Jurist, 72, Dr. *Lushington* said: "It does not seem that there was any serious difficulty to be overcome or danger to be encountered, in conducting this vessel from where she was up the river Tees; though I can well understand that, had the weather become more violent, and the tow-rope parted, there might have been serious risk of running upon one or the other sand. The services are short but successful. The single point is, whether, under the circumstances, the tender is sufficient or not. And I think, in looking at this case, I must bear in mind not merely the actual state of things, but what they might have been at that time of year and in that state of the weather, and I think that this was a service not lightly to be considered." Tender, £30 - £60 decreed. And in *The Lockwoods*, 9 Jur. 1017, the same judge said: "When I look at the accident which had occurred, the damage she had suffered, her disabled condition, the season of the year, and the state of the wind and sea, I am strongly of opinion that, had she been compelled to keep at sea, or to seek some distant port to leeward, she would have been exposed to great risk and danger, and therefore I think she was in urgent need of assistance. And in *The Versailles*, 1 Curtis, C. C. 362, *Curtis, J.*, refers to the change of the wind just after the vessel was got off a ledge of rocks, as showing that but for the service she would have remained on.

<sup>2</sup> *Brevoor v. The Fair American*, 1 Pet. Adm. 87, 95.

<sup>3</sup> *Stephens v. Bales of Cotton*, Bee, 170; *The Jonge Bastiaan*, 5 Rob. Adm. 322.

<sup>4</sup> *Stephens v. Bales of Cotton*, Bee, 170.

growing crops of cotton in order to save the property, this fact was considered in awarding salvage.<sup>1</sup> But one whose vessel had been lost while conveying the things saved to another place of delivery, is entitled only to freight, not salvage.<sup>2</sup>

On the other hand, when a barge was brought in which was found without anchor or crew, salvage was denied, because it was shown to be usual to leave barges there in that condition,<sup>3</sup> and generally mere land service in unlading a shipwrecked vessel and superintending those unlading her, is not a salvage service.<sup>4</sup>

If a vessel at sea is short-handed by reason of sickness,<sup>5</sup> or other casualty,<sup>6</sup> and is navigated into port by part of the crew of another vessel, this is to be treated as a salvage service. But when salvors found a ship derelict and went on board, and in their haste forgot to take with them a log glass, a watch, and a chart, it was held that the officer of a king's vessel, who was afterwards requested to supply these articles, and payment offered, was not entitled to dispossess the first salvors on the ground that they could not bring the vessel safely to port without his assistance.<sup>7</sup>

But it is said that a salvage service can only be founded in the rescuing of a ship and cargo from some impending danger or distress.<sup>8</sup> It would, therefore, seem that if part of the crew were captured, and subsequently recaptured and restored to their vessel, the only claim of the recaptors would be on the ground of supplying the deficiency in the number of the crew occasioned by the capture.<sup>9</sup>

<sup>1</sup> *Stephens v. Bales of Cotton*, Bee, 170.

<sup>2</sup> *Stephens v. Bales of Cotton*, Bee, 170.

<sup>3</sup> *The Upnor*, 2 Hagg. Adm. 3.

<sup>4</sup> *The Watt*, 2 W. Rob. 70.

<sup>5</sup> *The Harvest*, 1 Sprague, 537; *The Golondrina*, Law Rep. 1 Adm. 334.

<sup>6</sup> *Williamson v. Brig Alphonso*, 1 Curtis, C. C. 376; *The Active*, 1 Eng. L. & Eq. 644; *The Roe*; *Swabey*, Adm. 84; *Sturtevant v. The Geo. Nicholas*, 1 Newb. Adm. 449. In *The Janet Mitchell*, *Swabey*, Adm. 111, a vessel was met with in distress, her captain having been drowned, and some one was required to manage her. The mate of the vessel volunteered his services, and the vessels reached their ports in safety. Salvage was allowed to the owners, master, and rest of the crew.

<sup>7</sup> *The Blenden Hall*, 1 Dods. Adm. 414, 419.

<sup>8</sup> *The Mary*, 1 W. Rob. 448, 457.

<sup>9</sup> *The Mary*, 1 W. Rob. 448. The master and part of the crew in this case had been taken by pirates, and the vessel at the time she was discovered by the

Compensation has been granted for keeping near a vessel in distress, at the earnest request of her master and crew, although but little aid was rendered.<sup>1</sup> If a vessel is stranded near her port of destination, and it becomes necessary to transship the cargo, this is a salvage service.<sup>2</sup> So, if a vessel in distress is boarded at some risk by a fishing smack, and an order for a steamer taken, compensation as salvage is allowed.<sup>3</sup> And generally the court may give compensation, in the nature of salvage, for services which fall below those necessary to found a strict salvage claim.<sup>4</sup> And advice may in some cases amount to a salvage service.<sup>5</sup>

In a case where some shipwrecked mariners were taken from a ship which had rescued them, and they brought with them a box of gold, which was taken on board the vessel, it was held that, although this last vessel was not entitled to claim salvage, the persons and property being in no danger at the time, yet that a compensation was due beyond mere freight-money; and that process would lie against the property by a suit *in rem*, although the parties had parted with the possession of the gold.<sup>6</sup>

And salvage has been awarded for rescuing a raft of timber which was floating out to sea.<sup>7</sup>

As a general rule, when two vessels come into collision, they are bound to render assistance to each other if necessary;<sup>8</sup> and it is very clear that if the vessel in fault renders assistance to the other, she cannot make any claim for salvage compensation, either from the other vessel,<sup>9</sup> or from the cargo on board.<sup>10</sup> But if the service is rendered to the one in fault, although the court would

alleged salvors was in the offing with a signal of distress flying. They went out to her and brought her safely in, and afterwards joined in an expedition against the pirates. The master and crew were ransomed, and then the pirates attacked. The court held that salvage was only due for conducting the vessel into harbor.

<sup>1</sup> *Allen v. Ship Canada*, Bee, 90; *The Underwriter*, 4 Blatchf. C. C. 94.

<sup>2</sup> *The Westminster*, 1 W. Rob. 229.

<sup>3</sup> *The Ocean*, 2 W. Rob. 91. The value of the ship, cargo, and freight was £ 10,500, and £ 40 were allowed.

<sup>4</sup> *George v. Ship Arctic*, Bee, 232.

<sup>5</sup> *The Eliza*, Lush. Adm. 536.

<sup>6</sup> *A Box of Bullion*, 1 Sprague, 57.

<sup>7</sup> *A Raft of Spars*, Abbott, Adm. 485.

<sup>8</sup> See *ante*, Vol. I. p. 529.

<sup>9</sup> *The Iola*, 4 Blatchf. C. C. 81.

<sup>10</sup> *Cargo ex Capella*, Law Rep. 1 Adm. 356.

be reluctant, if the service rendered in consequence of the collision were but slight, to see it made the subject of salvage compensation, yet in a proper case salvage would be decreed.<sup>1</sup>

If a vessel is driven ashore in a gale of wind, or gets ashore by any accident, she is generally a fit subject for a salvage service.<sup>2</sup>

## SECTION V.

### OF DERELICT.

As to what is "derelict" there is no certain and accepted definition; and perhaps none better than a vessel which is abandoned and deserted by her crew without any purpose on their part of returning to the ship, or any hope of saving or recovering it by their own exertions.<sup>3</sup> If so abandoned, the ship is derelict,

<sup>1</sup> *The Sappho*, Swabey, Adm. 241. In *The Hannibal*, Law Rep. 2 Adm. 53, a collision occurred between A and B. A was in tow of a steam-tug, which after the collision rendered assistance to B. B was afterwards held in fault for the collision, and it was held that the tug was entitled to salvage, although by statute ships were bound mutually to assist each other after a collision.

<sup>2</sup> In *The James T. Abbott*, 2 Sprague, 101, where a vessel beating through the Narrows in Boston Harbor got ashore on George's Island, and was pulled off by a tug, the service was held to be one of salvage. In *The M. B. Stetson*, U. S. D. C. Mass., Jan. 1867, where a vessel at anchor off the same island was driven ashore in a gale of wind, *Lowell, J.*, said: "Speaking generally, it may be said, that the mere fact that a vessel is aground is enough to show that she is in a situation to have a salvage service rendered her. No doubt grounding in a tidal harbor, or in the Mississippi river or some similar place, may often be in fact one of the ordinary incidents of navigation, and not enough of itself to show danger or distress. But I apprehend it will be difficult to find an adjudged case of a vessel driven ashore in a gale of wind, and still more where the gale is still blowing, in which any doubt has been expressed of her being in such danger as to be open to salvage. See also *The Rajasthan*, Swabey, Adm. 171; *The Alfen*, id. 189; *The Himalaya*, id. 515.

<sup>3</sup> *The Aquila*, 1 Rob. Adm. 37; *The Amethyst*, Daveis, 20; *Rowe v. Brig* —, 1 Mason, 372; *The Elizabeth & Jane*, Ware, 35; *The Caroline*, 2 W. Rob. 124; *The Charlotta*, 2 Hagg. Adm. 361; *The Effort*, 3 Hagg. Adm. 165; *The Windsor Castle*, 2 Notes of Cases, Supp. liii.; *Mason v. Ship Blaireau*, 2 Cranch, 240; *The Watt*, 2 W. Rob. 70; *The Clarisse*, 1 Swabey, Adm. 129. In *The Minerva*, 1 Spinks, 271, a vessel was anchored off the coast, and the crew in endeavoring to escape were all drowned. The vessel was afterwards saved, and the court held that it was a case of derelict.

although the vessel is afterwards saved by the crew who left her, they having unexpectedly received assistance.<sup>1</sup>

If the ship be only temporarily left, with the distinct purpose of return, it is not abandoned, and therefore not derelict.<sup>2</sup> And if the master and crew remain on board, but give up the entire control of the vessel to the salvors, this does not make a derelict.<sup>3</sup> But if the property be actually deserted at sea, the presumption that it is derelict exists, and casts upon those who left it the burden of proving their purpose of return.<sup>4</sup> If the ship or property be left without any intention whatever, either of return or otherwise, as when the crew jump suddenly from a ship they think sinking, on board another vessel, and are carried off in it against their will, their own vessel is derelict *de facto*, but not *de jure*.<sup>5</sup>

<sup>1</sup> The Boston, 1 Sumner, 328. The vessel in this case was run into at sea. The master and crew, supposing she was about to founder, took to their boats, and afterwards met another vessel, by whose aid the next day their own vessel was brought into port. Held to be a case of derelict. See also The Florence, 20 Eng. L. & Eq. 607.

<sup>2</sup> There can be no doubt of the general principle that the master and crew may leave a vessel, and she cannot be considered as a derelict, if they had the intention of returning. Thus, if a vessel is left at anchor in the stream without any one on board, the master and crew having left with the intention of returning, this of course would not be a derelict. See The Upnor, 2 Hagg. Adm. 3. See also The Bee, Ware, 232; Tyson v. Prior, 1 Gallis. 133. In Clarke v. Brig Dodge Healy, 4 Wash. C. C. 651, it was held that where a vessel imbedded in the ice was drifting towards a shoal, upon which, if she had struck, she would have probably gone to pieces, and the crew left her on account of this danger, with the intention of returning if the danger should be escaped, the vessel was not a derelict. See also The John Perkins, U. S. C. C. Mass., 21 Law Rep. 87, 94; The Schooner Emulous, 1 Sumner, 207; The Island City, 1 Black, 121, 1 Clifford, C. C. 219, 221; The Joseph C. Griggs, 1 Bened. Adm. 80; The Champion, Brow. & L. Adm. 69. But if a vessel is deserted *de facto*, and while exposed to great danger is rescued by salvors, she will, it would seem, be considered a derelict, if the master and crew at the time they left her had no intention of returning, or rational hope of regaining possession of the vessel, though they endeavored to take possession after the salvors had rendered assistance. The Sarah Bell, 4 Notes of Cases, 144. See also The Brig John Gilpin, Olcott, Adm. 77.

<sup>3</sup> Montgomery v. The T. P. Leathers, 1 Newb. Adm. 421.

<sup>4</sup> The Cosmopolitan, 6 Notes of Cases, Supp. xvii., in the Irish Admiralty.

<sup>5</sup> The Fenix, Swabey, Adm. 13; The Cosmopolitan, 6 Notes of Cases, Supp. xvii., in the Irish Admiralty. In this latter case, as soon as it was found that their vessel had not sunk, the master and crew desired to return, but were prevented



But it has been held that where the master and crew leave the vessel for the preservation of their lives, a mere intention of sending a steamer to look for the vessel does not prevent it from being derelict.<sup>1</sup>

So a ship or goods sunk under the waters are generally derelict, but would not be so if the owner had not lost the hope and purpose of recovering his property, nor ceased his efforts for that purpose.<sup>2</sup> If goods are saved from a wreck, and the crew are taken off at the same time, the goods cannot be considered as derelict.<sup>3</sup> Nor are they so considered, where the vessel goes to pieces on the shore and the cargo floats out, if the master is using exertions to save the goods, unless indeed where they float out to sea.<sup>4</sup>

And in a case where a vessel met another at sea in a disabled condition, and took her crew off, and proceeded on her way, and a few hours afterwards went back, and put the second mate and some seamen on board the disabled vessel, who brought her safely into port, it was held that the vessel was not a derelict, although her own officers and crew would not go on board again.<sup>5</sup>

by the master of the vessel on which they were. The court considered that the leaving the vessel was under a momentary impulse for the purpose of saving their lives, and that it could not be considered as an abandonment, because they wished to go back as soon as their judgment returned. Stress was also laid on the fact that the leaving the vessel the moment the crew did tended rather to increase than diminish their power to save the vessel. But for these facts, the case is similar to that of *Mason v. Ship Blaireau*, 2 Cranch, 240, where the vessel, deserted by her crew, who jumped on board the vessel which ran into them, was considered a derelict. In *The Pickwick*, 20 Eng. L. & Eq. 628, the vessel came into collision with another, and the master and crew, with the exception of three men, at once abandoned her through fear. The three men afterwards left, and three days after the collision she was found deserted. Dr. *Lushington* said: "It has never been held that an abandonment at the instant of collision constitutes derelict, but I can entertain no doubt that, in the legal sense of the word, this vessel was a derelict to all intents and purposes, because three days had elapsed from the time of the collision."

<sup>1</sup> *The Coromandel*, Swabey, Adm. 205.

<sup>2</sup> *The Barefoot*, 1 Eng. L. & Eq. 661; *Bearse v. Figs of Copper*, 1 Story, 314. See also *The Thetis*, 3 Hagg. Adm. 14.

<sup>3</sup> *Warder v. La Belle Creole*, 1 Pet. Adm. 31.

<sup>4</sup> *The Samuel*, 4 Eng. L. & Eq. 581.

<sup>5</sup> *The Lovett Peacock*, U. S. D. C. Mass., 1867. *Lowell, J.*, said: "The question arises and has been earnestly argued, whether this was a case of derelict. I

If a ship or property be left, though not derelict, one who in good faith takes possession as salvor, is not a trespasser, but has his reasonable claim for salvage, according to the good he actually does.<sup>1</sup>

By the common law, the finder of lost property has an absolute title to it against all the world, except the owner. In England, however, derelicts found at sea belonged to the Lord High Admiral, until they were given up by him, in the reign of Queen Anne, to the sovereign, who, for the most part since that time, has continued to take them in a capacity distinguishable from that of sovereign. Wrecks, by which is meant property cast on the shore, often in England belong to the lord of the manor, who is authorized to keep them a year and a day for the owner, and if none appears at the expiration of that time, the property vests absolutely in the lord.<sup>2</sup>

What disposition is to be made of property found abandoned, when no one appears to claim it, cannot be said to be settled in this country. In an early case in Massachusetts, it was held that after the salvage was paid the property belonged to the government, to hold in trust till an owner should appear.<sup>3</sup> In another

cannot think it was, because the final abandonment by the owners and the occupation by the salvors were contemporaneous acts, and the one could probably never have happened unless in a situation where the other was possible, because the boat of the schooner was not capable of taking off all her crew."

<sup>1</sup> It would seem, however, to be well settled on principle and authority, that if a vessel is not a derelict, the master and his owners have the power, unless there is some immediate danger, to decline any assistance, and to choose their own salvors, and if persons render them assistance against their will, these persons will not only recover nothing for their services after the prohibition, but may forfeit compensation for their prior services. *The Glasgow Packet*, 2 W. Rob. 306; *The Barefoot*, 1 Eng. L. & Eq. 661; *The Glory*, 2 Eng. L. & Eq. 551. The case of *The John Gilpin*, *Olcott*, Adm. 77, where an opposite doctrine is intimated, proceeded on the ground that the vessel was derelict.

<sup>2</sup> *The King v. Property Derelict*, 1 Hagg. Adm. 383; *The King v. Two Casks of Tallow*, 3 id. 294; *The King v. Forty-Nine Casks of Brandy*, 3 id. 257. See also *The Merchants' Shipping Act of 1854*, 17 & 18 Vict. c. 104, §§ 471-475, for the present state of the law on this subject in England.

<sup>3</sup> *Peabody v. The Proceeds of Twenty-Eight Bags of Cotton*, U. S. D. C. Mass., 1829, 2 Am. Jurist, 119. The property in this case was found at sea and libelled for salvage, and one half was decreed. Twenty-two years afterwards, no owner having appeared, a supplemental libel was filed by the finders to recover the balance; but the court decreed as stated in the text.

district of this country, the practice, however, is to keep the proceeds a year and a day after the salvage is paid, and if no owner then appears, to pay them to the finder.<sup>1</sup> This we think is the more correct doctrine, and we should suppose that the court might in its discretion require bonds from the finder to restore the value of the property, if the owner should appear and claim it.

## SECTION VI.

### OF COMPENSATION IN CASES OF SALVAGE.

In respect to salvage compensation, the long-settled practice of the admiralty court has been to view it not as mere pay on the principle of a *quantum meruit*, or as a remuneration *pro opere et labore*, but as a reward given for bravely encountering the perils of the seas, that the general interests of navigation and the commerce of the country may be advanced.<sup>2</sup> But the court does not act on the same liberal principle as in prize cases.<sup>3</sup> And it has been said that in salvage claims arising on our western rivers, the precedents of courts administering the admiralty law on the ocean, in regard to the amount of compensation cannot be safely adopted, because the peril of life is generally much less.<sup>4</sup>

As to the amount of salvage which shall be decreed, or the proportions in which it shall be given to salvors, there is no fixed rule nor binding precedent, nor practice in admiralty.<sup>5</sup> Indeed, it can

<sup>1</sup> See *Marvin on Salvage*, 143, note 1. In *M'Donough v. Dannery*, 3 Dall. 188, the vessel had been captured and then abandoned, and afterwards brought into court by the salvors. The district court decreed one third of the gross proceeds as salvage. The case was then taken up by appeal to determine whether the residue should be returned to the original owners or to the captors. The Supreme Court expressed some doubt whether on abandonment by the captors the salvors were not entitled to the whole, or at least to the greater portion of the property, but as the salvors did not appeal this question was not decided.

<sup>2</sup> *The Sarah*, 1 Rob. Adm. 313, note; *The William Beckford*, 3 Rob. Adm. 355; *The Hector*, 3 Hagg. Adm. 90, 95; *The Clifton*, id. 117, 120; *The Industry*, id. 203, 204; *Mason v. The Blaireau*, 2 Cranch, 240, 266; and cases *passim*.

<sup>3</sup> *The Vine*, 2 Hagg. Adm. 1.

<sup>4</sup> *McGinnis v. The Steamboat Pontiac*, 1 Newb. Adm. 130, 5 McLean, C. C. 359.

<sup>5</sup> In *The Thetis*, 3 Hagg. Adm. 14, 62, Sir Christopher Robinson said: "The practice of the last century may be described in the following few pages, taken

scarcely be said that there is any rule whatever, except that ancient one which gives to the salvors one half of the property saved, when that property was absolutely "derelict" or abandoned; and Lord Stowell has declared this to be "obsolete," as a fixed rule.<sup>1</sup> And the position seems now to be established, that the reward in derelict cases should be governed by the same principles as in other salvage cases, namely, danger to property, value, risk of life, skill, labor, and the duration of the service.<sup>2</sup> It may be taken as the prevailing disposition of admiralty courts, or, as has been said, as the general sense of the maritime law, that salvage on derelict should not in ordinary cases go below a third, and never, or almost never, above one half.<sup>3</sup> And we are of opinion that English and American courts would now hesitate to give so much as half, unless in cases of unquestionable derelict, nor even then, unless there were in the case peculiar circumstances of exertion, peril, or merit.<sup>4</sup> The rule of a moiety was formerly applied much more

from a book of MS. notes of the late Sir Edward Simpson, to which my predecessor often referred: 'The maritime laws of England fix no certain proportion in cases of salvage, but are governed by circumstances of danger, hazard, trouble, and expense of saving; an eighth or tenth, except in cases of extreme hazard, is as much as is usually allowed. . . . In some cases of extreme hazard, one third of the value, or one fourth, or one sixth, or one ninth, or a sum of money on account of salvage is given.'" See also *The Adventure*, 8 Cranch, 221, and cases *passim*. In *Bond v. Brig Cora*, 2 Wash. C. C. 80, the court said: "In appreciating and properly rewarding such services, no rule but that which a sound discretion may suggest, upon a view of all the circumstances of each particular case, can be laid down." See *The Hopewell*, 2 Spinks, 259.

<sup>1</sup> *The Aquila*, 1 Rob. Adm. 37, 45.

<sup>2</sup> *The Florence*, 20 Eng. L. & Eq. 607; *The John E. Clayton*, 4 Blatchf. C. C. 372. This doctrine was assented to in *Post v. Jones*, 19 How. 150, 161, but a moiety was nevertheless allowed. So in *The George Dean*, Swabey, Adm. 290. In *Rowe v. Brig —*, 1 Mason, 372, 377, Mr. Justice Story considered the old rule of giving a moiety in case of a derelict, as a subsisting but flexible rule. See also *The Charles Henry*, 1 Bened. Adm. 8. The doctrine of the text was early asserted in this country. *Flinn v. The Leander*, Bee, 260. See also *Two Hundred and Ten Barrels of Oil*, 1 Sprague, 91.

<sup>3</sup> *Tyson v. Prior*, 1 Gallia. 133, 136; *Rowe v. Brig —*, 1 Mason, 372, 377; *Post v. Jones*, 19 How. 150, 161; *The Frances Mary*, 2 Hagg. Adm. 89; *The Reliance*, 2 Hagg. Adm. 90, note; *The Effort*, 3 Hagg. Adm. 165, 167; *The Elwell Grove*, 3 Hagg. Adm. 209, 221.

<sup>4</sup> See *The Minerva*, 1 Spinks, 271. In *The Inca*, Swabey, Adm. 370, an appeal to the Privy Council from the vice-admiralty court of the Bahamas, the court below awarded salvage in kind to the amount of sixty-six per cent on dry cotton

severely against the owners of the saved property, though it was seldom exceeded,<sup>1</sup> except where the property was of small amount, and the labor great.<sup>2</sup>

We have already said that effective services by steamboats should be particularly encouraged ;<sup>3</sup> and it has been held that if a steam tug is kept constantly employed during the winter on a dangerous station, and at a heavy expense, for the express purpose of rendering salvage and towage service to vessels in distress, her owners are entitled to the full remuneration usually awarded to salvors who peril life and property, though the particular service may not be accompanied by much danger to, or labor on the part of, the tug.<sup>4</sup>

Judge Sprague, in one case where a salvage service was performed by a tug in Boston Harbor, said : " In estimating the amount of compensation, one criterion is, for what would the owner of the tug, if he had known all the circumstances of the case, have agreed to let his boat go down to get the vessel off ; he and seventy-six on wet cotton, and seventy per cent on the net sales of the materials and stores. The court held that there was no precedent for awarding more than half, except in cases of derelict, and reduced the sum awarded to this amount.

<sup>1</sup> *Sprague v. Barrels of Flour*, 2 Story, 195 ; *The Britannia*, 3 Hagg. Adm. 153.

<sup>2</sup> *The William Hamilton*, 3 Hagg. Adm. 168, and note ; *The Jonge Bastiaan*, 5 Rob. Adm. 322 ; *The Jubilee*, 3 Hagg. Adm. 43, note ; *The Waterloo*, Blatchf. & H. Adm. 114. In the case of *Two Hundred and Ten Barrels of Oil*, 1 Sprague, 91, a whale ship discovered the wreck of another whale ship on a reef one thousand miles from any country whence assistance could be rendered, in a derelict condition. The captain of the salving ship, hoping to save the crew, went on board in his boat, but found no one ; he afterwards cut a hole in the deck to get out the oil, but did not succeed in his endeavor ; he also cut away the masts to prevent the vessel from going to pieces. Two days after the discovery the wreck went to pieces and the next day the oil in question was picked up. During this time the vessel nearly drifted on the reef in a calm. The weather was generally rough and squally. The master of the wrecked vessel on his arrival in port sold the ship and cargo for fifty-five shillings. The salving ship was fitted out for a voyage of three and a half years. At the time of the service she had taken one thousand barrels of oil and returned home in about two years and seven months from the time of her departure with nearly a full cargo. The market value at New Bedford of the property saved was \$ 6,740 ; and the court decreed \$ 5,740 to the libellants. In *Llewellyn v. Two Anchors*, 1 Bened. Adm. 80, the proceeds in court amounted to \$ 107. The owners had been notified and did not appear, and the whole balance after paying costs was awarded.

<sup>3</sup> See *ante*, p. 274.

<sup>4</sup> *Virden v. The Brig Caroline*, U. S. C. C. Delaware, 1857, 6 Am. Law Reg. 222.

to receive nothing if not successful.”<sup>1</sup> “It is obvious, however,” as has been said by Judge Lowell, “that this rule will not answer for all or most cases, because it takes into view only one side of the question, the risk, labor, and exposure of the salvors, without regard to the value of their services to the other party. Where the necessity is more urgent, and no time is given to bargain, and to choose between different offers, another element, namely, what would the owners of the property be willing to give rather than that the service should not be rendered, may fairly be looked at.”<sup>2</sup>

In some English cases, there has been a disposition to discriminate between articles easily saved, as gold and silver coins, or bullion,<sup>3</sup> and more bulky and less movable articles; giving a less proportion of the former than of the latter. But we know nothing like this in American decisions;<sup>4</sup> nor is this principle well sustained in England.<sup>5</sup>

<sup>1</sup> The *James T. Abbott*, 2 Sprague, 102.

<sup>2</sup> The *M. B. Stetson*, cited 2 Sprague, 102, note. In *The Acacia*, Same Court, Lowell, J., the steamer *Saxon*, valued at \$140,000, with a cargo valued at over \$200,000, was on her way from Boston to Philadelphia, and when off Scituate saw a vessel in distress at anchor, and towed her to Boston. The time occupied was about seven hours. It was in evidence that a tug could have been hired to perform the job for about \$300. The court held that the same rule was not applicable to such a vessel and a tug seeking a job, and awarded \$2,200. The value of the property saved was \$42,000.

<sup>3</sup> The *Emma*, 2 W. Rob. 315. The remark of Dr. *Lushington* in this case, does not seem to be more than a *dictum*. It was contended that the court were bound to look to the services rendered to the ship and cargo, separately and apart, and stress was laid on the fact, that the cargo was not, from its nature, liable to damage by immersion in the water. Dr. *Lushington* said: “The ordinary usage of the court is to take the whole value of the ship and cargo, and assess the amount of the remuneration upon the whole, each paying its due proportion; I am not aware, excepting in the instance of silver or bullion, that any distinction has ever been taken, or that parties have been permitted to aver, that the services were of greater importance to the ship than they were to the cargo, and therefore, that the ship should bear the lesser burden or *vice versa*. . . . With respect to silver and bullion, it is true that a distinction is wisely and properly permitted, and this upon the consideration that it is more easily rescued and preserved, than more bulky articles of merchandise.”

<sup>4</sup> See *Warder v. La Belle Creole*, 1 Pet. Adm. 31, 46. We are not aware that this precise point has been recently determined in this country, but no discrimination is made in favor of bullion in general average. See *ante*, Vol. I. p. 456, note 2.

<sup>5</sup> See *The Jonge Bastiaan*, 5 Rob. Adm. 322; *The Vesta*, 2 Hagg. Adm. 189, 193, per Sir *Christopher Robinson*.

From one half, the salvage claim may be diminished by the circumstances to mere wages or a very slight compensation.<sup>1</sup> It is obvious, therefore, that the amount is always dependent upon the particular facts and merits of each case, and the view which the court may take of them. Hardship, long and severe labor, risk of life,<sup>2</sup> exposure to injury of any kind, danger readily encountered, enterprise and energy,<sup>3</sup> and the large value at risk,<sup>4</sup> and the number of those among whom the salvage must be divided. These are the elements which swell the salvage, and the want of these of course diminishes it. Where a raft of timber was found adrift in New York harbor and taken on shore and watched for several days, the court decreed fifty dollars as salvage.<sup>5</sup>

Generally, we presume, salvors are not allowed freight *eo*

<sup>1</sup> The *Purissima Concepcion*, 3 W. Rob. 181, 8 Notes of Cases, 503. In The *Duke of Clarence*, 1 W. Rob. 346, where £25 were tendered on the ground that the service was one of mere ordinary labor, Dr. *Lushington* said: "I apprehend the term, as applied to questions of salvage, to mean that labor which may be performed by an individual not possessed of nautical skill, but of mere strength of arm and limb. When a vessel approaches the shore, mere ordinary labor is always to be obtained in great abundance, but labor united with nautical skill, being scarce, is more difficult to be procured. When obtained, its value must be estimated by a somewhat higher consideration than mere ordinary labor." £35 were awarded.

<sup>2</sup> The *Ebenezer*, 8 Jurist, 385; The *William Hannington*, 9 Jurist, 631; The *William Beckford*, 3 Rob. Adm. 355.

<sup>3</sup> In The *Brig Susan*, 1 Sprague, 504, *Sprague, J.*, said: "There is one element which I have heretofore taken into view, in some cases, and which is not to be overlooked in this. It is that encouragement should be given to competent persons upon dangerous parts of our coast, to associate together, and keep themselves organized, with suitable boats and other appliances, to render prompt and efficient assistance to vessels in distress."

<sup>4</sup> When the property is large, a greater sum is given than when it is small. The *Ship Henry Ewbank*, 1 Sumner, 400, 412; The *Earl of Eglinton*, Swabey, Adm. 7. But where the property is small, a greater proportion of the value is given than when the property is great. The *Blenden Hall*, 1 Dods. 414, 421; The *Waterloo*, 2 Dods. 433, 442; The *Vesta*, 2 Hagg. Adm. 189; *Tyson v. Prior*, 1 Gallis. 133; *Smith v. The Stewart*, Crabbe, 218. In The *Ocean*, 3 Hagg. Adm. 194, where an anchor and a chain cable, together with a buoy and buoy rope of the value of £20 were found by some mariners who had gone in search of anchors, etc., the court decreed two fifths, after deducting expenses. This suit was brought to determine the amount due in similar cases, and may be considered as a leading case.

<sup>5</sup> A Raft of Spars, Abbott, Adm. 485.

*nomine*, in addition to salvage, for bringing a cargo into port, but in one case, where a moiety was decreed to the salvors, freight was allowed on the other moiety.<sup>1</sup>

Whether services are rendered at sea, or near the coast, is an important element in determining the amount of compensation ; as the chance of the vessel's being saved is much greater when near the shore, than when at sea.<sup>2</sup>

If the salvor's vessel is injured or lost whilst engaged in the salvage service, the presumption is that the injury or loss was caused by the necessities of the service, and the burden of proof is on the defendants, to show that the loss was caused by the fault of the salvors.<sup>3</sup>

Perhaps the courts are disposed to encourage nothing more than salvage efforts for the purpose of saving life. The court has no power to decree salvage for saving life merely.<sup>4</sup> "But if it can be connected with the preservation of property, whether by accident or not, then the court can take notice of it, and it is always willing to join that to the *animus* displayed in the first instance."<sup>5</sup> It has been held that if the lives of the crew are saved by one vessel, and the property by another, the one saving the crew is entitled to salvage.<sup>6</sup> But there seems to be no reason why salvage should be allowed in such a case and not where the crew are saved, but no assistance rendered to the vessel by any one, and the distinction is repudiated by Dr. Lushington.<sup>7</sup>

<sup>1</sup> *Post v. Jones*, 19 How. 150, 161. The goods in this case were carried by the salvors over 20,000 miles.

<sup>2</sup> In *The Lovett Peacock*, U. S. D. C. Mass., 1867, *Lowell, J.*, said : "I have always strongly insisted upon the distinction between a vessel disabled at sea and abandoned there, and one abandoned or a wreck on a frequented coast where assistance can be obtained ; because an attention to these distinctions seems to me to reconcile many of the most apparently conflicting decisions upon the *quantum* of salvage. The true point here is that not merely the risk the vessel is in of present or early damage or destruction must be looked at, but the peril the owner is in of ever recovering his property."

<sup>3</sup> *The Thomas Blyth*, Lush. Adm. 16.

<sup>4</sup> *The Zephyrus*, 1 W. Rob. 329.

<sup>5</sup> *The Aid*, 1 Hagg. Adm. 83 ; *The Emblem*, Daveis, 61 ; *Sturtevant v. The Geo. Nicholas*, 1 Newb. Adm. 449 ; 210 Barrels of Oil, 1 Sprague, 91.

<sup>6</sup> *The Queen Mab*, 3 Hagg. Adm. 242 ; *The Mulhouse*, U. S. D. C. Florida, *Marvin, J.*, 22 Law Rep. 288.

<sup>7</sup> *The Zephyrus*. 1 W. Rob. 329. *The Queen Mab* is explained on the ground



If slaves are regarded as property, they form an exception to this rule, and the owner of them contributes according to their value.<sup>1</sup>

Nevertheless, these efforts to save life do not command a compensation so much higher than is given for the saving of property as might be expected, for the reason that it is not a deviation if the vessel goes out of her way to save life, and therefore the insurance is not forfeited; <sup>2</sup> whereas it is a deviation to wander for the purpose of saving property,<sup>3</sup> and compensation must be made for the forfeiture of the insurance.<sup>4</sup> This deviation the master by the law merchant has a right to make, if in the exercise of a

that the vessel was a derelict, and the court had not to contend against any opposition on the part of the owners of the *Queen Mab*. This subject is now provided for by the Merchants' Shipping Act of 17 & 18 Vict. c. 104, § 459, which enacts that salvage for saving life shall be paid before all other claims; and if, after deducting the expenses incurred, the value of the property shall not be sufficient to pay the amount of salvage due in respect of such life or lives, the Board of Trade may, in its discretion, award such sums as it may deem fit, in whole or in part satisfaction of any amount of salvage so left unpaid. See *The Bartley*, Swabey, Adm. 198; *The Coromandel*, id. 205; *The Eastern Monarch*, Lush. Adm. 81; *The Pensacola*, Brow. & L. Adm. 206; *The Fusilier*, id. 341. In *The Clarisse*, Swabey, Adm. 129, the court allowed salvage for preserving life, although the statute had been passed between the time of the rendering of the service and of the decision. See under the Act of 9 & 10 Vict. c. 99, *Silver Bullion*, 2 Spinks, 70. The 17 & 18 Vict. does not apply to the salvage of life from a foreign ship on the high seas. *The Johannes*, Lush. Adm. 182. But the provisions of this act are extended by Act of 24 Vict. c. 10, § 9, "to the salvage of life from any British ship or boat, wheresoever the services may have been rendered, and from any foreign ship or boat, where the services have been rendered either wholly or in part in British waters."

<sup>1</sup> *Jerby v. 194 Slaves*, Bee, 226; *Flinn v. The Leander*, id. 260. See also *ante*, Vol. I. p. 324, n. 6.

<sup>2</sup> *The Boston*, 1 Sumner, 328; *Bond v. Brig Cora*, 2 Wash. C. C. 80; *Lawrence v. Sydebotham*, 6 East, 45; *The Henry Ewbank*, 1 Sumner, 400; *Settle v. St. Louis Perpet. Ins. Co.* 7 Misso. 379; *A Box of Bullion*, 1 Sprague, 57.

<sup>3</sup> *Bond v. Brig Cora*, 2 Wash. C. C. 80; *Mason v. Ship Blaireau*, 2 Cranch, 240; *Warder v. La Belle Creole*, 1 Pet. Adm. 31; *210 Barrels of Oil*, 1 Sprague, 91.

<sup>4</sup> See *Bond v. Brig Cora*, 2 Wash. C. C. 80; *Warder v. La Belle Creole*, 1 Pet. Adm. 31; *The Nathaniel Hooper*, 3 Sumner, 542, 578. But in *The Dev-eron*, 1 W. Rob. 180, Dr. *Lushington* held that in apportioning the remuneration in salvage cases every vessel was to be considered as uninsured, on account of the inconvenience of considering whether a vessel had in each case forfeited its insurance. See also *The Orbona*, 1 Spinks, 161.

sound discretion he deems it expedient.<sup>1</sup> And if the only means of saving life are by saving property also, as where a vessel was taken in tow, because the crew could not be rescued in any other way, this would not constitute a deviation.<sup>2</sup>

Under ordinary circumstances, the owners of the saving ship have one third of the amount decreed,<sup>3</sup> and may have more if the salvage service exposes their ship to peculiar danger.<sup>4</sup>

The owners of steamers which perform a salvage service are entitled to a liberal compensation.<sup>5</sup>

<sup>1</sup> The Ship Nathaniel Hooper, 3 Sumner, 542, 579.

<sup>2</sup> Crocker v. Jackson, 1 Sprague, 141.

<sup>3</sup> The Henry Ewbank, 1 Sumner, 400; The Sch. Boston, id. §98; Mason v. Ship Blaireau, 2 Cranch, 240; Bond v. The Cora, 2 Pet. Adm. 361; The Amethyst, Daveis, 20, 28; Concklin v. Brigantine Harmony, 1 Pet. Adm. 34, 43, note; Evans v. The Ship Charles, 1 Newb. Adm. 329; Union Tow Boat Co. v. The Bark Delphos, 1 Newb. Adm. 412; The Lovett Peacock, U. S. D. C. Mass., 1867.

<sup>4</sup> In The Waterloo, Blatchf. & H. Adm. 114, the vessel claiming salvage was bound from Havana to Cadiz. In latitude 34° N. 75' W. she found the Waterloo a derelict, and with great difficulty and danger towed her into New York. Two thirds of the amount decreed was allowed the owners, on the ground that the risk was very great, and that the master and crew should not have imperilled property worth \$72,000, to rescue property worth \$40,000. In the following cases one half of the amount decreed has been allowed the owners. The Columbia, 3 Hagg. Adm. 428; The Martha, 3 Hagg. Adm. 434; The Waterloo, 2 Dods. 433; The Himalaya, Swabey, Adm. 515; The Rising Sun, Ware, 378, 385; Taylor v. Ship Cato, 1 Pet. Adm. 48, 68; The Cumberland, U. S. D. C. Mass., 1815, cited 1 Sumner, 427; Montgomery v. The T. P. Leathers, 1 Newb. Adm. 421. In The Nicolina, 2 W. Rob. 175, one fifth was allowed. In The Hope, 3 Hagg. Adm. 423, about two fifths; and in Smith v. The Stewart, Crabbe, 218, one thirteenth. In The Albion, 3 Hagg. Adm. 254, where a fishing smack performed a salvage service, seven twentieths were given. In The Deveron, 1 W. Rob. 180, and in The Louisa, 2 id. 22, also cases of fishing smacks, seven sixteenths. In The Holder Borden, 1 Sprague, 144, the vessel had been wrecked, and the master, in order to rescue part of the crew which had been left on a desolate island, and a quantity of oil which was also left there, purchased a brig, and in payment gave a draft upon one of the owners of the wrecked ship, who accepted and paid the draft. In this brig the master went to the island took on board the crew and oil and brought them safely home. The net proceeds saved were in value \$17,628.57. The court held that the owner by accepting and paying the draft became the sole owner of the brig, and was entitled to \$12,953.12.

<sup>5</sup> The Martin Luther, Swabey, Adm. 287; The Enchantress, Lush. Adm. 96. One half of the amount decreed was allowed in The Howard, cited 3 Hagg. Adm. 256, and in The Earl Grey, 3 Hagg. Adm. 363; and in The Beulah, 1 W. Rob.

Compensation has been refused the owners where the master had made a valid contract to perform the service.<sup>1</sup> And only a remuneration for wear and tear was allowed where the service was performed by boats from the shore.<sup>2</sup>

Compensation was entirely refused to the owners where the vessel was abandoned at sea, and the crew in the boats fell in with another vessel which was also abandoned, and which they saved.<sup>3</sup> If a vessel is met with short-handed at sea, and assistance is rendered by sending some men on board, this is a salvage service, as we have seen, and one for which the owners of the vessel rendering assistance are entitled to some compensation, but not to a great one unless the assistance thus rendered materially weakened their own vessel.<sup>4</sup> If the vessel is engaged in a lucrative employment at the time of rendering a salvage service, this of course is an essential ingredient in estimating the compensation to be

477, over four fifths were allowed. In *The Spirit of the Age*, Swabey, Adm. 286, the court allowed the damage done to the vessel and a reasonable sum for the loss of services to be deducted before division, and then allowed the owners one half of the moiety, remarking that after such deductions more than a moiety was never allowed. This point was raised but not decided in *The Island City*, 1 Black, 121, 129. When this case was before the circuit court, 1 Clifford, C. C. 224, one third was allowed the owners. It was not, however, then claimed that they were entitled to more. In *The Paris*, 1 Spinks, 289, one fourth of the amount decreed was allowed the owners. In *The Ring*, before Mr. Bryan, sitting as referee, and who was afterwards judge of the United States District Court, South Carolina, 2 Am. Law Review, 259, three fifths were allowed the owners, In *The Underwriter*, 4 Blatchf. C. C. 94, when twenty-five hundred dollars were awarded a steamer for remaining by a ship ashore until assistance came, two thousand were given the owners, one hundred apiece to the master and mate, and the rest was divided among the crew. In *The Rajasthan*, Swabey, Adm. 171, one half the salvage was awarded to the sole owner who was also the master. In *The Saint Nicholas*, Lush. Adm. 29, £ 2,800 were awarded in all, and of this amount, £ 1,500 were given to the owners.

<sup>1</sup> *The Mulgrave*, 2 Hagg. Adm. 77. See also *post*, p. 307.

<sup>2</sup> *The Charlotte*, 3 W. Rob. 68. But in *The Norden*, 1 Spinks, 185, it was held that owners of fishing smacks were entitled to salvage, although the service was of short duration and not dangerous.

<sup>3</sup> *The Two Friends*, 2 W. Rob. 349.

<sup>4</sup> *Williamson v. The Brig Alphonso*, 1 Curtis, C. C. 376, 380. And see cases cited *ante*, p. 286, n. 6. But in *The Lovett Peacock*, U. S. D. C. Mass., 1867, one third was allowed the owners, although the men put on board the vessel saved were fewer in number than the crew taken from her. See *The Czarina*, 2 Sprague, 48.

awarded to the owners ; but if not actually engaged, it has been held that no allowance is to be made for what she might have earned.<sup>1</sup>

Even if actually engaged at the time, if the vessel to which the service is rendered is not then in imminent danger, it is said that no compensation is to be made for any loss of profits, unless the master of the vessel saved is informed at the time of the nature of the employment in which the salvor is engaged.<sup>2</sup>

The master<sup>3</sup> has perhaps commonly in our courts about twice as much as the mate ; but here, and still more as to the seamen, it can hardly be said that there is a rule.<sup>4</sup> The share of an apprentice is given to him, and not to his master,<sup>5</sup> and an agreement to the contrary would be void ;<sup>6</sup> and slaves, it would seem, are entitled to salvage for their own use.<sup>7</sup> If some of the salvors decline or refuse to claim salvage, this will not enure to the benefit of the co-salvors, but to the benefit of the owners of the property.<sup>8</sup>

<sup>1</sup> *The Louisa*, 3 W. Rob. 99.

<sup>2</sup> *The Nicolai Heinrich*, 22 Eng. L. & Eq. 615 ; *The Hedwig*, 1 Spinks, Adm. 19, *nom.* *The Headwig*, 24 Eng. L. & Eq. 582.

<sup>3</sup> In *The Paris*, 1 Spinks, 291, where £800 were decreed, the master was allowed £120.

<sup>4</sup> In *The Lovett Peacock*, U. S. D. C. Mass., 1867, *Lowell, J.*, a vessel was met with at sea disabled. The crew were taken off, and the captain of the saving vessel conceived the plan of taking the disabled vessel into port. His mate declined to go on board, and the second mate and four men went. The master was allowed one sixth, the second mate one ninth, the four men about one twentieth each. The balance, after the allowance of one third to the owners, was divided among the six men who remained, in proportion to their wages, the mate receiving, owing to the peculiar circumstances, only an able seaman's share.

<sup>5</sup> *Mason v. Ship Blaireau*, 2 Cranch, 240 ; *The Two Friends*, 2 W. Rob. 349 ; *The Columbine*, 2 W. Rob. 186. In this last case additional compensation was made to the owners of the vessel, on the ground that although the owner was not entitled to receive the whole benefit of the apprentice's services, yet that to a certain extent the owner was entitled to derive benefit from it. But the language used by the learned judge in the subsequent case of *The Two Friends*, is not consistent with the master's claim in any case.

<sup>6</sup> *The Columbine*, 2 W. Rob. 186.

<sup>7</sup> In *Small v. Goods, etc.*, 2 Pet. Adm. 284, 287, salvage was decreed to slaves for their own use. But in *Mason v. Ship Blaireau*, 2 Cranch, 240, it was adjudged to the master, he having agreed to manumit the slave and to pay him one fifth of the sum allowed.

<sup>8</sup> *Evans v. Ship Charles*, 1 Newb. Adm. 329.

## SECTION VII.

## ON WHAT PROPERTY SALVAGE IS ALLOWED.

Salvage is generally decreed on all the property saved, whether ship,<sup>1</sup> cargo,<sup>2</sup> or freight.<sup>3</sup> In a case where a government transport had been captured by the enemy and then abandoned, and afterwards found derelict and brought into port, no objection was made

<sup>1</sup> A bottomry bond and wages earned subsequent to the service would be deducted from the value of the vessel at the time of suit brought, but wages earned prior to the service should not be deducted. *The Selina*, 2 Notes of Cases, 18.

<sup>2</sup> Where a salvage service is concluded at one port and the cargo is taken to another and sold, the value at the former port is to be taken. *The George Dean*, Swabey, Adm. 290. The cargo in this case was sent on from Lisbon to London, it being represented that it could not be sold at Lisbon. The court said: "I imagine the strict method to arrive at the value of the cargo at Lisbon would be, not on any assertion of its being unsalable there, but by putting it at £ 7 and £ 8 per cent less than the proceeds of its sale in London, deducting freight and other charges for the voyage from Lisbon to London, but allowing a *pro rata* freight as far as Lisbon." When the cargo is saved, suit should be brought against it as well as the ship, as the proper mode of apportioning the salvage is to take the value of both, and if the value of the cargo does not appear, the court will not be able without much difficulty to apportion the salvage. *The Mary Pleasants*, Swabey, Adm. 224. In *The Peace*, Swabey, Adm. 115, the net value of the cargo was taken, and the following charges were deducted from the gross value: discount  $2\frac{1}{2}$  per cent, custom-house entry, freight, weighing, brokerage, commission, but not a gratuity for primage. In *The Charlotte Wylie*, 2 W. Rob. 495, it was claimed that freight, primage, and insurance should be deducted from the value of the ship and cargo. No dispute was raised between the owners of the ship and the owners of the cargo, and the court said that if the freight was deducted from the value of the cargo, it would be taken afterwards as a separate item, on which the court must decree salvage, and therefore refused to make the deduction; and the deduction of primage and insurance was not allowed.

<sup>3</sup> In *The Peace*, Swabey, Adm. 85, where an action was entered against the vessel and her freight, but as the cargo had been delivered, only the vessel was arrested, and bail was given for both ship and freight, the court held that the owners of the vessel were bound to bring in an account of freight on oath, and to set forth when, and the names of the parties by whom, such freight had been paid. In *The Norma*, Lush. Adm. 124, a vessel bound from Honduras to England was disabled on the voyage and towed into Bermuda, where expenses nearly equal to the whole freight were incurred to refit. The voyage home was afterwards completed and the cargo delivered. It was contended that as no freight was due, as between ship-owner and the owner of the cargo, at Bermuda, no freight could be estimated in computing the value of the property saved; but the

to the jurisdiction, and salvage was decreed.<sup>1</sup> So in a case where assistance was rendered to a government transport, no objection being made.<sup>2</sup>

But there is an exception to the general rule in favor of the mails,<sup>3</sup> and perhaps in the case of a ship of war belonging to our own government.<sup>4</sup> And we doubt whether property belonging to the government can in any case be seized by process *in rem*.<sup>5</sup> And it has been determined in this country that vessels of war belonging to a foreign neutral power cannot be arrested in our ports into which they have lawfully come.<sup>6</sup>

The same is true of a private armed vessel sailing under a commission from a foreign government.<sup>7</sup> But the general rule is that our courts have jurisdiction over all property, to whomsoever it belongs, which comes within their territorial jurisdiction; and though an exception is made in favor of an armed vessel, and her munitions of war, yet the private property of a foreign sovereign, or the prize property which a vessel of war brings into our ports, comes within the general rule, and not within the exception.<sup>8</sup>

We should therefore say that where the court could take jurisdiction, it would enforce a salvage claim, but not otherwise.<sup>9</sup> Salvage is not, however, allowed on the clothing left by the master and crew on board of the vessel which they abandon, but this should be returned free of charge.<sup>10</sup> Nor on money found on the person of a drowned man.<sup>11</sup> Nor, it is said, for saving from a

court held that this principle did not apply, and allowed salvage upon one half of the total gross freight. See *The Dorothy Foster*, 6 Rob. Adm, 88, cited *ante*, p. 258, n. 2.

<sup>1</sup> *The Lord Nelson*, Edw. Adm. 79.

<sup>2</sup> *The Marquis of Huntley*, 3 Hagg. Adm. 246.

<sup>3</sup> *Sch. Merchant*, cited in *Marvin on Salvage*, 132.

<sup>4</sup> This was so held in England in 1816, in the case of *The Comus*, cited 2 Dods. 464.

<sup>5</sup> See *Briggs v. Light-Boats*, 11 Allen, 157.

<sup>6</sup> *The Sch. Exchange v. McFaddon*, 7 Cranch, 116.

<sup>7</sup> *L'Invincible*, 1 Wheat. 288.

<sup>8</sup> *The Santissima Trinidad*, 7 Wheat. 283.

<sup>9</sup> In *The Prins Frederik*, 2 Dods. 451, this question was discussed at length, but no decision was given, as the foreign government afterwards consented that the judge of the admiralty court might determine the amount of salvage due.

<sup>10</sup> *The Rising Sun*, Ware, 378.

<sup>11</sup> *The Amethyst*, Daveis, 20, 29. The expense of his interment was, however, allowed out of this money.

wreck bills of exchange, or other evidences of debt or documents of title.<sup>1</sup> It has also been held that admiralty will not allow, in a suit for salvage, charges made by the salvors for repairs; but this, we should think, could not always be true, when these repairs were necessary and properly made.<sup>2</sup>

The rights of co-shippers are sometimes quite distinct, the goods of each shipper paying the salvage decreed for saving his goods only, if there be any difference in the facts, circumstances, or merits attending the saving of different parcels of the cargo.<sup>3</sup> But it would seem that no difference is to be made between the ship and cargo. The value of the one is to be added to the value of the other, and a proportion of this amount is to be given.<sup>4</sup>

In a well-considered case the rule is stated as follows: "When a ship and cargo accidentally stranded are saved by lightening the ship, by carrying out anchors, or by other common or continuous labor or service, carried on with a view to the saving of both ship and cargo, the salvage expenses are properly to be apportioned upon the ship, freight, and cargo, in proportion to their respective values, as in a case of general average. . . . But where, as in the present case, the ship is lost, and the voyage broken up, no such rule obtains, but each article of the cargo or invoice is to be charged with its own particular expenses of saving. The interests of the parties are sundered by the destruction of the ship, and the maxim *salve qui peut*, save who can, applies." <sup>5</sup>

## SECTION VIII.

### OF THE MANNER IN WHICH A CLAIM FOR SALVAGE MAY BE BARRED.

If assistance is rendered to a vessel under circumstances which would generally constitute it a salvage service, it may yet not be

<sup>1</sup> The Emblem, Daveis, 61.

<sup>2</sup> The Rainger, 2 Hagg. Adm. 42. This decision seems to have proceeded on the ground that the admiralty had no jurisdiction over a shipwright's bill.

<sup>3</sup> See The Samuel, 4 Eng. L. & Eq. 581; Stephens v. Bales of Cotton, Bee, 170.

<sup>4</sup> The Vesta, 2 Hagg. Adm. 189; Montgomery v. The T. P. Leathers, 1 Newb. Adm. 421.

<sup>5</sup> The Mulhouse, U. S. D. C. Florida, Marvin, J., 22 Law Rep. 276.

such; as where the service is rendered under a custom to give assistance gratuitously in similar instances, or where the aid is given under a special contract. And even after the right of action has accrued, it may be lost by misconduct or by a lapse of time. We shall consider these in their order.

If two vessels sail as consorts, and under an agreement to assist each other, neither can claim salvage for assistance rendered to the other.<sup>1</sup> It has been questioned, whether if two ships be owned by one owner, or by the same parties, and one of them relieves the other in distress, the relieving ship can claim salvage.<sup>2</sup>

It has also been questioned whether a custom to render assistance might not be such and so proved as to bar a claim for salvage. We should say that even where vessels sailing together are not consorts, nor owned by the same party, it is possible that there may be a usage of mutual help, which would defeat a claim of salvage,<sup>3</sup> and under such circumstances, such a claim would be materially diminished, even if no usage were proved.<sup>4</sup> Thus it is said that if a steamer be stranded on a sand-bank in the Mississippi, and another steamer draws her off, usage prohibits any claim for salvage.<sup>5</sup>

But a custom of one port that vessels shall assist each other gratuitously, is not binding on vessels of other ports rendering assistance to vessels of the port where the custom exists.<sup>6</sup> And we should doubt whether a custom that steamers should aid sail-

<sup>1</sup> *The Zephyr*, 2 Hagg. Adm. 43.

<sup>2</sup> *The Margaret*, 2 Hagg. Adm. 48, note.

<sup>3</sup> *The Harriot*, 1 W. Rob. 439. This was a case of salvage in the South Sea, rendered by one whaling vessel to another. The service was not denied, but the respondents contended that a custom existed in the South Sea Fishery for vessels to render assistance to each other gratuitously. Such a custom being proved to exist, Dr. *Lushington* held that it was legal. But such a usage does not apply to the case of a whaling vessel being frozen up in Davis's Straits, and another whaling vessel sailing from England for the purpose of rescuing her. But in such a case, government bounty having been granted for the rescue of the vessel, the claim of the salvors for demurrage and the payment of stores was not allowed by the court. *The Swan*, 1 W. Rob. 68.

<sup>4</sup> *The Ganges*, 1 Notes of Cases, 87; *The Trelawney*, 4 Rob. Adm. 223, 227; *The Waterloo*, 2 Dods. 433, 443. But see *Williamson v. The Brig Alphonso*, 1 Curtis, C. C. 376.

<sup>5</sup> *Montgomery v. The T. P. Leathers*, 1 Newb. Adm. 421, 429.

<sup>6</sup> *The Red Rover*, 3 W. Rob. 150.



ing vessels, and *vice versa*, would be good, there being no mutuality between the two classes of vessels.<sup>1</sup>

If at the time of the service the salvors make a bargain with the owners of the property in peril, or their servants, as to the amount of salvage, this is enforced by the court only so far as it seems equitable and conformable to the merits of the case. And it is wholly disregarded if it be deemed unconscionable and oppressive to the owners of the property saved, or entered into under circumstances which amount to compulsion.<sup>2</sup>

<sup>1</sup> See *The Africa*, 1 Spinks, 299. In *The Coringa*, U. S. D. C. Mass., Lowell, J., a vessel lost her rudder-head off Cape Cod, and came to anchor in an exposed place. She was finally towed to Boston by the *Charles Pearson*, a powerful steamer owned in whole or in part by insurance companies of Boston, and which was known as the underwriters' boat. It appeared in evidence that the officers and crew of the *Pearson* were hired by the month, and their contract was understood to require them to perform duty in saving vessels without further or other compensation. It also appeared that the steamer usually made a special contract in such a case for payment by the day, or hour, or the job; and that when this was not done, her services were usually settled for upon similar principles. No special contract was made by the master of the *Coringa*, but he testified that he knew he was dealing with the underwriters' boat, and he inferred that salvage would not be demanded. The service performed in this case was rendered under such circumstances that it was one of salvage, unless the facts above set forth took away this character from it. Judge Lowell held that they did not, and that the libellants were entitled to recover salvage. The learned judge said: "So far as these respondents are concerned, their officers and men must be considered to be volunteers; they were under no contract or duty toward the respondents, and their rights among themselves must be settled independently. I do not consider this fact, nor the fact that the managers of the *Pearson* usually made a bargain for her use, nor both together, constitute such a holding out to the world as should require me to insist that they undertake salvage services for towage wages."

<sup>2</sup> *Williams v. Barge Jenny Lind*, 1 Newb. Adm. 443, where an agreement that the salvor should have half of the property saved was set aside. See also *The Sch. Emulous*, 1 Sumner, 207; *Bearse v. Pigs of Copper*, 1 Story, 314; *Post v. Jones*, 19 How. 150; *Cowell v. The Brothers*, Bee, 136; *Schutz v. Ship Nancy*, id. 139; *The Theodore*, Swabey, Adm. 351; *The Enchantress*, Lush. Adm. 93; *The Crus. V.*, Lush. Adm. 583. What we consider to be the true rule, is stated in the case of *Eads v. The Steamboat H. D. Bacon*, 1 Newb. Adm. 274, 280, "that a contract should be presumed *prima facie* to be fair; but if proven to be unconscionable, the court of admiralty, like the court of equity, would refuse to enforce it." In *The Helen & George*, Swabey, Adm. 368, Dr. Lushington said: "This case turns upon the effect of the agreement, which was certainly made by the master. It was truly contended by Dr. Jenner that such

The salvors may also make an agreement with the master of the vessel for a compensation which falls far short of that due for a salvage service,<sup>1</sup> "provided there be a clear understanding of the nature of the agreement; that it is made with fairness and impartiality to all concerned; and that the parties to it are competent to form a judgment as to the obligations to which they are binding themselves."<sup>2</sup> But, in the language of Dr. Lushington, in order to bar a salvage claim, there must be a distinct agreement between the parties, for a given sum and in explicit terms.<sup>3</sup> Mere loose conversation between the parties concerning compensation is, therefore, disregarded.<sup>4</sup> But it is no objection to an agreement that it was verbal, and the court will not set it aside unless it is wholly inequitable, although it is a hard bargain.<sup>5</sup> And if a proposal is made by the salvors and refused by the vessel, this is no

agreements will generally be enforced by the court. The principle upon which the court acts is, that if satisfied that an agreement has been made, it will carry it into effect unless totally contrary to justice and the equity of the case; but the owner of the ship, against whom the agreement is attempted to be enforced, may show that it was improperly obtained. The owner may contend that, under the circumstances, the sum of money was grossly exorbitant; and *à fortiori*, if he can show that the agreement was obtained by fraud or compulsion, no court would hold it to be binding. But when the execution of such an instrument is once proved, it is *primâ facie* binding, and the burden of proof falls on those who dispute the validity of the instrument."

<sup>1</sup> The *Mulgrave*, 2 Hagg. Adm. 77; *Bondies v. Sherwood*, 22 How. 214. The *Whitaker*, 1 Sprague, 282; *Dominy v. Anchors, &c. of the Brig D'Alberti*, 1 Bened. Adm. 77. In this case it was held that even if there were no formal authorization of the person who made the contract, by the other libellants, yet as he was their head and spokesman, and they must have been cognizant that some agreement was made by him, they must be deemed to have acquiesced in it.

<sup>2</sup> The *True Blue*, 2 W. Rob. 176; The *Henry*, 2 Eng. L. & Eq. 564; The *Resultatet*, 22 Eng. L. & Eq. 620; The *Phantom*, Law Rep. 1 Adm. 58. In the case of The *British Empire*, 6 Jurist, 608, Dr. Lushington said: "Now the general principle with respect to such agreements I apprehend to be this, that it lies upon the party setting it up to prove two things, first that such agreement was made and secondly that it was just. Where there has been a definite, distinct agreement, with ample time for the parties to consider what they are doing, the court would be reluctant to interfere with it, but only under these circumstances."

<sup>3</sup> The *Wm. Lushington*, 7 Notes of Cases, 361. See The *Pensacola*, Brow. & L. Adm. 306.

<sup>4</sup> The *Salacia*, 2 Hagg. Adm. 262, 265.

<sup>5</sup> The *Fire-Fly*, Swabey, Adm. 240.

evidence, in a suit by the salvors, of the value of their service.<sup>1</sup> So if an agreement is afterwards rescinded by mutual consent.<sup>2</sup>

If a vessel in need of salvage assistance makes a signal for a steamer, and assistance is rendered in pursuance of that signal, the signal is to be construed as a signal for assistance, although not necessarily one of distress, and the service as one of salvage.<sup>3</sup>

It has been held that if a vessel is hired to do a stated service, as to tow a dismasted vessel which is anchored in a dangerous situation to a place of safety, but no price is named, because the time it may take is not altogether certain, this is a salvage service, and the agreement is of no avail.<sup>4</sup> We cannot, however, assent to

<sup>1</sup> *The Jan Hendrik*, 1 Spinks, 181.

<sup>2</sup> *The Africa*, 1 Spinks, 299.

<sup>3</sup> *The Brig Susan*, 1 Sprague, 499; *The James T. Abbott*, 2 id. 101; *The M. B. Stetson*, U. S. D. C. Mass., *Lowell*, J., Jan. 1867; *The John Bunyan*, 8 Law Times, n. s. 704; *The Little Joe*, Lush. Adm. 88. In *The Bomarsund*, Lush. Adm. 77, *Dr. Lushington* said: "The signal hoisted was for a pilot only, but this does not prevent the services rendered from being in the nature of salvage. The true question always is, what was the condition of the ship? Was she in distress? And the character of the signal hoisted is only one piece of evidence bearing upon this question. The court will form its conclusions upon all the evidence and all the circumstances." See *The Hedwig*, 1 Spinks, 19, 24 Eng. L. & Eq. 582.

<sup>4</sup> *Hennessey v. Ship Versailles*, 1 Curtis, C. C. 353; *The Independence*, 2 Curtis, C. C. 350. We consider ourselves justified in our doubt of the doctrine of these cases, because when the latter one was taken up to the Supreme Court of the United States, that court were equally divided in opinion, as appears by the report of the case on another point. *Hemmenway v. Fisher*, 20 How. 255. In *The William Lushington*, 7 Notes of Cases, 361, *Dr. Lushington* held where the owners of a vessel in distress agreed with the owner of a cutter that should go to the relief of the vessel, but no sum was fixed as compensation, that the master and crew of the cutter, who did not know of the agreement, were not bound by it, but might sue as salvors. See also *The Island City*, 1 Clifford, C. C. 210. In such a case, even if it were held that the persons hired could maintain an action for salvage, it would seem just that the party with whom the contract was made should be a party to the suit, and the court would decree as salvage the amount agreed upon, so that the owner of the property saved would not be obliged to pay for the service more than once. See *The Whitaker*, 1 Sprague, 282. In *The John Shaw*, 1 Clifford, C. C. 230, the master of a vessel which was aground on a shoal off Nantucket, made an agreement with persons who came from the shore that they should go to work to get the vessel off, and if successful, and the parties could not agree on the amount to be paid, it should be left out to referees. If unsuccessful the salvors were to have the privilege of stripping the vessel. It was held that this did not bar a suit for salvage, and that the refusal of the salvors to

this doctrine; because we are unable to see why the parties may not make a valid contract, leaving the price to be determined on the doctrine of a *quantum meruit*. It has, however, been said that an agreement of any kind does not alter the nature of the service as a salvage service, but only furnishes the rule by which the court is to be governed in awarding the compensation;<sup>1</sup> and that it is in this way that admiralty takes cognizance of an agreement to perform the service.<sup>2</sup>

A binding agreement to take the ship to a place of safety includes the cargo on board, and any agreement that separate salvage should be allowed for the cargo would not be binding,<sup>3</sup> except, we presume, where the cargo is taken out, and additional expense in this way incurred.

And where several contracts for salvage services have been made at different times, and a subsequent salvage in respect to the same property is performed under no definite contract, the rate fixed in the prior contracts is not imperative.<sup>4</sup>

If an agreement is made between the owners of a vessel employed in salvage services and the crew, that the latter should not in any case receive salvage compensation, it would doubtless be upheld if it were entered into understandingly by the seamen, but

refer the matter only went in diminution of the amount of compensation. *Clifford, J.*, said: "Nothing short of a contract to pay a given sum for the service to be rendered, or a binding engagement to pay at all events, whether successful or unsuccessful in the enterprise, will operate as a bar to a meritorious salvage claim." In *The Wm. L. Garrison*, U. S. D. C. Mass., 1867, *Lowell, J.*, a schooner which had lost her foremast and part of her main-topmast came to anchor under the lee of Noman's land, an island off the coast of Massachusetts. The master set a signal of distress, which was seen by a person at Chilmark, who informed the agent of a steamer at Edgartown about eight o'clock in the evening. The steamer fired up and went in search of the vessel and found her about one o'clock, and on coming up, "hailed to know if the schooner wanted assistance or to be towed, and the answer was that she did." After the anchor was hove up, and a line from the steamer made fast to the schooner, and before the towing had begun, the captain of the schooner asked what the charge would be. The captain of the steamer answered that he could not tell, but it would not be unreasonable. Held, that this was not a contract.

<sup>1</sup> *The Sch. Emulous*, 1 Sumner, 207.

<sup>2</sup> *The A. D. Patchin*, 1 Blatchf. C. C. 414. See also *The Catherine*, 6 Notes of Cases, Supp. xliii; *Bearse v. Pigs of Copper*, 1 Story, 314, 323.

<sup>3</sup> *The Westminster*, 1 W. Rob. 229.

<sup>4</sup> *Bearse v. Pigs of Copper*, 1 Story, 314.

the burden of proof would be on the owners to show that such an agreement was made.<sup>1</sup>

It is perfectly well settled, and for obvious and strong reasons, that any gross misconduct<sup>2</sup> on the part of salvors, and especially any embezzlement of the property saved,<sup>3</sup> forfeits the whole claim of the party who is personally guilty, or participant of the wrongdoing; but not of innocent co-salvors.<sup>4</sup>

And if a master who is also a part-owner, embezzles property, his shares as owner and as master are forfeited.<sup>5</sup> And it has been contended that the captain is so far the agent of the owners that they are not entitled to salvage if he embezzles property, but this position cannot be maintained.<sup>6</sup> The question how far the owner

<sup>1</sup> *The Pride of Canada*, Brow. & L. Adm. 208. See *ante*, p. 306, n. 1.

<sup>2</sup> *The Joseph Harvey*, 1 Rob. Adm. 306; *The Bello Corrunes*, 6 Wheat. 152; *The Clarisse*, Swabey, Adm. 129, 133; *The Charles Adolphe*, Swabey, Adm. 153; *The Perla*, Swabey, Adm. 230; *The Lady Worsley*, 2 Spinks, 253; *The Martha*, Swabey, Adm. 489.

<sup>3</sup> *Schooner Dove*, 1 Gallis. 585; *The Bello Corrunes*, 6 Wheat. 152.

<sup>4</sup> *Mason v. Ship Blaireau*, 2 Cranch, 240. In *The Island City*, 1 Black, 121, Grier, J. said: "The embezzlement proved was not the secret act of one or two of the crew. A general system of plunder seems to have been carried on while the bark lay at the wharf in Hyannis, and before the crew returned to claim their property. In this the officers and crew of the Westernport seem all to have been actively or passively implicated. Locks were broken, chests and trunks forced open, and clothing, money and other articles of value were carried away, and never returned. Those who did not actively participate in this systematic and general pillage have connived and consented thereto, and have justly been decreed to have forfeited all right to compensation." The owners of the vessel performing the service were allowed salvage in this case, but the officers and crew were held to have forfeited their claims to compensation. See *same case*, 1 Clifford, C. C. 221. In *The Mulhouse*, U. S. D. C. Florida, *Marvin, J.*, 22 Law Rep. 276, part of the crew of a wrecking vessel remained at the wreck, and the others returned to port in their vessel with some kegs of specie. One keg was stolen by some of those who returned, and it was held that only those of the crew who remained by the wreck were entitled to salvage.

<sup>5</sup> *The Schooner Boston*, 1 Sumner, 328; *The Mulhouse*, U. S. D. C. Florida, *Marvin, J.*, 22 Law Rep. 280.

<sup>6</sup> *The Rising Sun*, Ware, 378; *The Missouri's Cargo*, 1 Sprague, 260. The question was discussed at length in this case, whether a conspiracy, fraud and actual embezzlement on the part of the master would defeat the claim of the owners of the vessel, the property having been saved. The court were of the opinion that only the guilty parties should suffer. The *Duke of Manchester*, 2 W. Rob. 470, to the contrary, may be explained on two grounds, either that the

of the saving vessel is liable for losses occasioned to the property saved, by the unseaworthiness of his own vessel, or by the misconduct of his officers and crew, is one of much interest and importance. There seems to be a distinction between the nature and extent of the liability of the owner of a trading vessel which accidentally falls in with another vessel, and renders salvage services, and the nature and extent of the liability of the owner of a vessel which is employed in rendering salvage services as a business.

In the case of a trading vessel we should not hold the owner responsible for losses occasioned to the property saved, by the misconduct of the officers and crew of his vessel. But in the case of a wrecking vessel a different rule applies. The master and crew are employed by the owner for the very object of accomplishing salvage services, and consequently they are his agents, and he is liable for all their torts while engaged in such business. This rule does not forfeit the salvage awarded to such owner, but only renders him liable for any loss occasioned by the misconduct of his officers and crew. Thus, in a case where this question was much considered, the crew had stolen a keg of specie, which had been recovered, and salvage was paid to the finders of it, and the shares to which the original salvors would have been entitled were forfeited, it was contended that the owner of the vessel ought to make good the amount of salvage which was paid the finders of the specie, because such salvage was occasioned by the misconduct of his servants, but the court held that as the shares forfeited amounted to more than the salvage paid the finders of the specie, the owners of the specie had sustained no loss, and the owner of the vessel was not liable.<sup>1</sup>

The owners of a wrecking vessel are also obliged to keep their vessel in a sound and seaworthy condition, and are liable for any loss occasioned by their neglect of duty in this respect.<sup>2</sup>

Salvors have so much in their power, that it is quite important to hold them strictly to their duty of protecting and preserving the property for the benefit of their owners, with all reasonable

innocence of the owners was not proved, or that no beneficial service was rendered.

<sup>1</sup> The *Mulhouse*, U. S. D. C. Florida, *Marvin, J.*, 22 Law Rep. 287.

<sup>2</sup> The *Mulhouse*, *supra*; The *Pacific*, U. S. D. C. Florida, cited 22 Law Rep. 289.

diligence and care, and with entire honesty.<sup>1</sup> And this responsibility of the salvors continues so long as the property is subject to the decree of the court. So that an embezzlement or theft after it is in custody of the officers of the court still works a forfeiture.<sup>2</sup> But salvage is not forfeited by misconduct of the crew before the salvage, or, probably after, if nothing wrong can be imputed to them in connection with the salvage service, or the property.<sup>3</sup>

In a case before the Privy Council, the law is stated as follows : " Mistake or misconduct other than criminal, which diminishes the value of the property salvaged, or occasions expense to the owners, are properly considered in the amount of compensation to be awarded. Wilful or criminal misconduct may work an entire forfeiture of it; but that must be proved by those who impute it. The presumption of course is in favor of innocence, and this rule applies so strongly in favor of salvors that the learned judge of the admiralty . . . has laid it down that the evidence must be 'conclusive' before they are found guilty; by which he must be understood to mean that it must be such as leaves no reasonable doubt in the mind of the judge." <sup>4</sup>

In an English case, a tender had been made, but after the completion of the salvage service, the owners having suffered loss by a long detention of the ship, which they attributed to the salvors, deducted an amount for such loss from the sum tendered, and paid the remainder into court. At the time of the alleged misconduct by the salvors, the vessel was in the possession of the Receiver of Droits. It was held that no deduction should be made for any misconduct after the property had passed from the possession of the salvors.<sup>5</sup>

A doubt has been expressed whether salvors who employ a steam-tug to tow the injured vessel, at a time when there is no opportunity of selection, so far make the tug their agent that they must suffer for the negligence of those in command of it, to any

<sup>1</sup> In *The John Perkins*, U. S. D. C. Mass., 19 Law Rep. 490, 496, the share of a salvor was diminished because he was not sufficiently watchful in preventing third persons from plundering the vessel.

<sup>2</sup> *Schooner Boston*, 1 Sumner, 328.

<sup>3</sup> *The Centurion*, Ware, 477, 484.

<sup>4</sup> *The Atlas*, Lush. Adm. 528.

<sup>5</sup> *The Hopewell*, 2 Spinks, 249.

greater extent than the diminution in value occasioned by such negligence.<sup>1</sup>

If property which has been embezzled after having been saved, comes again into the possession of the owner of it, salvage on it is due to those of the original salvors who had nothing to do with the embezzlement.<sup>2</sup> But any neglect or want of due skill or care on their part, would forfeit or diminish their salvage.<sup>3</sup> Whether they might not be answerable further for mischief caused by their interference with the property has not been decided. We should say, however, that they would be liable as other wrong-doers; that is, on the same ground and to the same extent.

The duties of parties when a pilot is on board in charge of a vessel we have already considered,<sup>4</sup> and only remark here that a salvor cannot excuse negligence on his part by proof that there was a pilot on board.<sup>5</sup> The utmost honesty and good faith on the part of the salvors is required. All attempts at extortion, either by direct acts,<sup>6</sup> or by an exaggerated account of the service performed, are received by the court with great disfavor, and work a forfeiture or diminution of salvage.<sup>7</sup>

Forfeited shares in salvage enure generally to the benefit of the owners of the property saved, and not to the co-salvors.<sup>8</sup>

It has been held at common law, that where one of the crew, who had been guilty of embezzlement, sued the owner of his ship

<sup>1</sup> The *Atlas*, in P. C. Lush. Adm. 529.

<sup>2</sup> The *Missouri's Cargo*, 1 Sprague, 260, U. S. D. C. Mass., 18 Law Rep. 38.

<sup>3</sup> The *Rosalie*, 1 Spinks, 188, 25 Eng. L. & Eq. 605; The *Lockwoods*, 9 Jurist, 1017; The *Bark Dygden*, 1 Notes of Cases, 115; The *Neptune*, 1 W. Rob. 297; The *Duke of Manchester*, 2 W. Rob. 470; The *Barefoot*, 1 Eng. L. & Eq. 661; The *Glory*, 2 Eng. L. & Eq. 551; The *Dosseitei*, 10 Jurist, 865; The *Cape Packet*, 3 W. Rob. 122. In this last case it is said that the extent of the diminution "is not measured by the amount of loss or injury sustained, but is framed upon the principle of proportioning the diminution to the degree of negligence, not to the consequences." See also The *Mulhouse*, U. S. D. C. Florida, *Marvin, J.*, 22 Law Rep. 282.

<sup>4</sup> See *ante*, p. 111.

<sup>5</sup> The *Duke of Manchester*, 2 W. Rob. 470.

<sup>6</sup> *Houseman v. Schooner North Carolina*, 15 Pet. 40; The *Giacomo*, 3 Hagg. Adm. 344; The *Susannah*, cited 3 Hagg. Adm. 345, note.

<sup>7</sup> The *Elizabeth & Jane, Ware*, 35, 37; The *Towan*, 2 W. Rob. 259.

<sup>8</sup> The *Rising Sun, Ware*, 378; *Schooner Boston*, 1 Sumner, 328; The *Island City*, 1 Clifford, C. C. 221, 1 Black, 121.



for his share of the salvage, this owner could not make the defence of embezzlement, because the owner of the property had paid to him the share of the seaman, without deducting what was forfeited by embezzlement.<sup>1</sup> The master has no right to give away any of the cargo or stores of his vessel; and an acceptance of them by the salvors, or their connivance with his waste or misuse of such cargo or stores, would forfeit or diminish their salvage.<sup>2</sup>

A salvage claim may also be lost by a sufficient lapse of time.<sup>3</sup>

In cases of salvage, the salvors were formerly admitted as witnesses in their own behalf, from necessity, as they were often the only persons who had any knowledge of the circumstances.<sup>4</sup> But this necessity, from which their competency arose, limited that competency, and they were not admissible as witnesses for themselves, or for each other, to entirely independent facts which could be proved by other testimony.<sup>5</sup> Now, however, the interest of a party does not disqualify him from testifying.<sup>6</sup>

From the fact that they were thus admitted, and the reason for their admission, we should draw another inference; namely, that material perjury on their part should operate as an embezzlement of the truth, and of the trust which is in their hands, and should work a forfeiture of their claim. This has been earnestly contended for, but the question has not yet received, so far as we know, distinct adjudication.

A salvor is not barred by receiving a small sum of money and giving a receipt in full. In such a case the tendency of the court is not to allow the receipt to operate as a bar, and if it is of opinion that the salvor, although he comprehended the receipt, formed an erroneous idea of his own services, the receipt will be disregarded.<sup>7</sup>

A question of much interest was presented in a case in England, where the facts were as follows: A vessel in tow of a steam-tug came in collision with another vessel, also in tow of a steam-tug. The tug of the first vessel to avoid being crushed cast off the tow-

<sup>1</sup> *Blake v. Patten*, 15 Maine, 173.

<sup>2</sup> *Ship Octavia*, cited in *Marvin on Salvage*, 113.

<sup>3</sup> *The Rapid*, 3 Hagg. Adm. 419; *The Samuel*, 4 Eng. L. & Eq. 581.

<sup>4</sup> *The Elizabeth & Jane*, Ware, 35.

<sup>5</sup> *The Sch. Boston*, 1 Sumner, 328, 345; *The Henry Ewbank*, id. 400, 432.

<sup>6</sup> See *post*, Book iii. c. xi. sect. 2.

<sup>7</sup> *Silver Bullion*, 2 Spinks, 7.

rope, and shortly afterwards the vessel drifted against another vessel that was at anchor, which vessel was then assisted by the tug. Compensation being claimed for this service, it was contended that the second collision was caused by the fault of the tug in not returning sooner to the vessel it had been towing, and that no salvage was therefore due, and Dr. Lushington, being of the opinion that the tug did not return soon enough, dismissed the libel.<sup>1</sup> On appeal to the Privy Council, the question of law was considered one of much difficulty, but the court being of the opinion that on the facts the tug was not in fault, did not find it necessary to decide the point.<sup>2</sup>

If salvors tortiously convert property saved by them to their own use, this tort may be waived by the owners, and the salvors are then entitled to a reasonable compensation for their services.<sup>3</sup>

## SECTION IX.

### OF MILITARY SALVAGE.

When a vessel or other property is captured by any force hostile to the United States, and is recaptured before condemnation as prize by any competent authority, a meet and competent sum is awarded as salvage, according to the circumstances of each case. If the property belonged to the United States, it is restored to the United States, and the salvage costs and expenses ordered by the

<sup>1</sup> The *Golden Light*, Lush. Adm. 355.

<sup>2</sup> The *Golden Light*, Lush. Adm. 374. The court said: "A most important principle of law is involved in this decision, which as far as our knowledge extends is new: that third persons can avail themselves of the breach of a contract to which they are strangers, on the ground that if it had been duly performed, they would have escaped injury to which they have been subjected."

<sup>3</sup> *Tome v. Dubois*, 6 Wallace, 548. In this case several booms on the Susquehanna river were carried away by a freshet, and a large quantity of logs were swept away. The defendant saved some, and sawed them into planks. The owner of the logs was unable to effect a settlement with the defendant, and sold all his interest in the logs to the plaintiff, who thereupon made a demand upon the defendant, and on refusal brought this action. The defendant contended that the property having been converted previously to the sale, no property passed to the plaintiff; but the court held that the former owner could waive the tort, that the action could be maintained, and that the salvor was entitled to compensation.

court are to be paid from the treasury of the United States. If the recaptured property belonged to persons residing within or under the protection of the United States, the court adjudges the property to be restored to its owners, on the payment of such sum as the court may award as salvage costs and expenses. If the property belonged to any person permanently resident within the territory, and under the protection of any foreign prince, government, or state in amity with the United States, and by the law or usage of such prince, government, or state, the property of a citizen of the United States would be restored under like circumstances of recapture, it is restored to such owner upon such terms as by the law or usage of such prince, government, or state would be required of a citizen of the United States under like circumstances of recapture; and when no such law or usage is known, it is restored upon the payment of such salvage costs and expenses as the court may order. The whole amount awarded as salvage is decreed to the captors, and no part to the United States, and is distributed as in the case of proceeds of property condemned as prize.<sup>1</sup>

Salvage is demandable as of right for vessels or cargoes saved from pirates or a public enemy.<sup>2</sup> And in case of recapture, it follows as an incident of prize, and will be awarded by the court of restitution, whether prayed for in the libel or not.<sup>3</sup> And it is lawful to take a ship at sea which is in a condition liable to capture, and bring or send her in for examination and adjudication by the courts.<sup>4</sup>

The amount of salvage on recapture was fixed by statute for most cases;<sup>5</sup> and when not so determined was held to be governed by the general principles of law.<sup>6</sup> Now, however, by the act of

<sup>1</sup> Act of 1864, c. 174, § 29, 13 U. S. Stats. at Large, 314. This section also provides that nothing in the act shall be construed to contravene any treaty of the United States.

<sup>2</sup> *Talbot v. Seeman*, 1 Cranch, 1; *The Progress*, Edw. Adm. 210.

<sup>3</sup> *The Sch. Adeline*, 9 Cranch, 244.

<sup>4</sup> *Talbot v. Seeman*, 1 Cranch, 1.

<sup>5</sup> Act of 1800, c. 14, 2 U. S. Stats. at Large, 16. See *The Sch. Adeline*, 9 Cranch, 244. This act, however, is expressly repealed by Act of 1864, c. 174, § 35, 13 U. S. Stats. at Large, 315.

<sup>6</sup> *Talbot v. Seeman*, 1 Cranch, 1. This was a case of a recapture by an American vessel of a Hamburg vessel from a French vessel. France and the United

1864, a meet and competent sum is to be awarded as salvage, according to the circumstances of each case.

It has been said in England that military salvage, being fixed by law at a low rate, may be increased by the court, when special services are rendered.<sup>1</sup>

Lord Stowell has held that the master and crew are, strictly speaking, the only salvors; the owners having generally but a slight claim, grounded only on the danger incurred by their property.<sup>2</sup> But every one concerned in the rescue of a captured ship has a lien on the property for his salvage, and his action *in personam* as well as *in rem*.<sup>3</sup> In England, it is no part of the duty of the crew, as seamen, to rescue their own ship in case of capture;<sup>4</sup> but rescue is a voluntary and meritorious act, to be rewarded as such. If one does only his duty, he cannot on this ground claim military any more than civil salvage;<sup>5</sup> and this is sometimes said

States were at war, and Hamburg was neutral to both. The court held that the case did not fall within the third section of the act of 1800, construing that section to apply only to the case of a friend hostile to the capturing power. One sixth was allowed as salvage.

<sup>1</sup> The *Sir Francis Burton*, 2 Hagg. Adm. 156.

<sup>2</sup> The *San Bernardo*, 1 Rob. Adm. 176.

<sup>3</sup> The *Two Friends*, 1 Rob. Adm. 271.

<sup>4</sup> In England, the law is, that the obligation of the crew is at an end on a capture taking place. The *Two Friends*, 1 Rob. Adm. 271; The *Beaver*, 3 Rob. Adm. 292. They may, therefore, be entitled to salvage on recapture, as well as where the service is performed by third persons. But in this country it is certain that it is the duty of the crew to remain by the vessel after capture until condemnation. It would, therefore, seem that they did no more than their duty in recapturing the vessel. In *Phillips v. M'Call*, 4 Wash. C. C. 141, the vessel had been captured and a prize crew put on board; but on another vessel approaching, the captors, fearing recapture, left the vessel in the possession of part of her original crew, they giving a ransom bill, promising to pay half the value. It was held that the crew were not entitled to salvage, their contract not being dissolved by the capture. But in *Clayton v. Ship Harmony*, 1 Pet. Adm. 70, salvage was allowed on a recapture by the crew, their contract being considered to be at an end. In *Williams v. Suffolk Ins. Co.*, 3 Sumner, 270, the question was whether a decree of the admiralty court in Connecticut, giving salvage to the crew of a vessel who had recaptured her when she was illegally detained by a foreign power, was binding upon the insurers. Mr. Justice *Story* held that the decree was conclusive, and added: "If that decree were re-examinable, there is no question that it was rightfully a case for salvage; for the recapture saved the vessel and outfits from an imminent peril of condemnation."

<sup>5</sup> See note, *supra*.

where the service rendered is not so strictly within his duty, but that he might have refused to perform it.<sup>1</sup> Nor is it necessary that the salvor should incur personal risk; thus where the enemy sells<sup>2</sup> or gives<sup>3</sup> a captured ship to a stranger, who brings her back to her owner, his right to salvage is unquestionable.

As to freight, it has been held that this must contribute to salvage, when a commencement of the voyage has taken place, then a capture, and a recapture, by which the voyage was afterwards accomplished. In that case the whole freight is included in the valuation on which salvage is given.<sup>4</sup> But it is not always sufficient to make the freight contributory that its earning was made possible by the recapture; as if a ship be cut out of port, and then recaptured, and she afterwards sails on and completes her voyage; no salvage would be due from the freight.<sup>5</sup>

When there is a recapture by a public ship of war, and the parties do not consent to appraisement, the value of the recaptured property must be ascertained by a sale of it.<sup>6</sup> Recapture to give the right to salvage must be legal, for if founded on a tort no compensation is due.<sup>7</sup>

Whether salvage is to be decreed or not in cases of recapture, is often a question of much difficulty, and one of mingled law and fact. So far as the principal cases may aid in answering this question, we have arranged them as follows:—

Military salvage has been decreed, and the vessel restored to the original owner, because the condemnation and sale under which it was purchased and brought home were set aside as illegal.<sup>8</sup> Nor is the right of salvage taken away by a subsequent capture

<sup>1</sup> See *Phillips v. McCall*, 4 Wash. C. C. 141, where it was held that a passenger, and another person who was the ship's physician, were bound to aid in rescuing the vessel after capture.

<sup>2</sup> *The Henry*, Edw. Adm. 192. In *The London*, 2 Dods. 74, the captors offered to release the vessel to the master on condition of his drawing a bill for £1,000, payable in London. He did this, but took care to send advices to London in time to prevent the payment. Held, that he was entitled to salvage.

<sup>3</sup> *The Sir Peter*, 2 Dods. 73.

<sup>4</sup> *The Dorothy Foster*, 6 Rob. Adm. 88.

<sup>5</sup> *The Dorothy Foster*, 6 Rob. Adm. 88, 91, per Sir *William Scott*.

<sup>6</sup> *Cross v. Brig Dolphin*, Bee, 152.

<sup>7</sup> *Davison v. Seal-skins*, 2 Paine, C. C. 324.

<sup>8</sup> *The Flad Oyen*, 1 Rob. Adm. 135.

and condemnation in an enemy's port when that sentence is overruled and annulled by the sovereign of the state, and the ship released.<sup>1</sup> Salvage was allowed when a ship of war of the United States recaptured from the French a Hamburg ship, France and the United States being then at war, and France and Hamburg neutral as to each other, it being considered that although France and Hamburg were neutral, yet the conduct of the French government showed that the rights of nations would have been violated had the vessel been taken in.<sup>2</sup> And when an American vessel was captured by a French privateer, and her master gave a ransom bill, payable only on her arrival in Havana, whereupon she was ordered to Havana with a French prize-master on board, and an English ship captured her and put a prize crew on board, who brought her into her American port, it being apparent that this bill was no longer payable, and was saved to the owner by the recapture, salvage was decreed.<sup>3</sup>

So also, when a captured ship had been abandoned by the captors to go in pursuit of another prize, and it was afterwards found by another vessel in a derelict condition, one half was given to the salvors.<sup>4</sup> When an English privateer, finding enemy's (French) property on board a neutral ship (an American), captured her, and put two men only on board, and the neutral master promised to go into a British port, but he afterwards attempted to go into an enemy's port, and the prize crew besought the aid of another British armed ship, who again captured the neutral, it was held that the first seizure constituted a legal capture, but that the services of the cruiser were sufficient to entitle her to salvage.<sup>5</sup> Salvage is allowed in case of a recapture from pirates.<sup>6</sup>

Restoration was decreed without salvage in the following cases. In a case of a capture by a foreign cruiser, which was fitted out in a port of the United States in violation of our neutrality, the

<sup>1</sup> The Charlotte Caroline, 1 Dods. 192.

<sup>2</sup> Talbot v. Seeman, 1 Cranch, 1; The War Onskan, 2 Rob. Adm. 299.

<sup>3</sup> Moodie v. Brig Harriet, Bee, 128.

<sup>4</sup> The Lord Nelson, Edw. Adm. 79. The question seems to have been considered more as a case of derelict, than as salvage on recapture.

<sup>5</sup> The Resolution, 6 Rob. Adm. 13.

<sup>6</sup> The Marianna, 3 Hagg. Adm. 206. See also Davison v. Seal-skins, 2 Paine, C. C. 324; The Calypso, 2 Hagg. Adm. 209.

capture being considered as illegal.<sup>1</sup> Nor was salvage allowed for merely stopping a ship from entering an enemy's port, for there can be no salvage for recapture, unless the property has been in the actual or constructive possession of the enemy;<sup>2</sup> and the recaptured ship must come into the *actual* possession of the recaptors; but in one such case salvage was decreed under the general maritime law, although the case did not come within the English prize act.<sup>3</sup>

If the vessel does not actually assist in the recapture, she is not entitled to a salvage, as where she is prevented from assisting by becoming becalmed.<sup>4</sup> So also where an American ship was captured by the enemy and condemned, and sold to a subject of the enemy, and afterwards recaptured by an American privateer; because, by the general maritime law, a sentence of condemnation extinguishes the title of the original proprietor.<sup>5</sup> So also where an American ship was seized by French custom-house officers, and released on bail, to respond adjudication in the French prize court, and was captured by English ships as she was dropping down the river, on the ground that she was already out of the enemy's hands, and no service was rendered to her.<sup>6</sup> Salvage was not allowed for rescuing a neutral American ship from a belligerent, who arrested her for an alleged breach of treaty or of the law of nations.<sup>7</sup> A neutral vessel can claim no salvage for a recapture from a belligerent, because it has no right whatever to make recapture.<sup>8</sup> But salvage is allowed where the property of friends or

<sup>1</sup> The Brig *Alerta*, 9 Cranch, 359.

<sup>2</sup> The Ann Green, 1 Gallis. 274, 293.

<sup>3</sup> The *Edward & Mary*, 3 Rob. Adm. 305. The vessel in this case was brought to by a French lugger in a storm, but was not boarded on account of the weather. A British frigate came in sight and captured the lugger, and the vessel escaped and arrived safely in port. The act of Parliament declared that "if at any time afterwards surprised and retaken by any of his majesty's ships of war," etc. This was held to make an actual possession by the recaptors necessary.

<sup>4</sup> The *Dorothy Foster*, 6 Rob. Adm. 88.

<sup>5</sup> The *Star*, 3 Wheat. 78.

<sup>6</sup> The *Robert Hale*, Edw. Adm. 265.

<sup>7</sup> *Waite v. Brig Antelope*, Bee, 233; *Talbot v. Seeman*, 1 Cranch, 1; *The War Onskan*, 2 Rob. Adm. 299.

<sup>8</sup> *Talbot v. Seeman*, 1 Cranch, 1, per *Marshall*, C. J.

allies is retaken from a common enemy. We have in this country statutory provision for this case.<sup>1</sup>

If a belligerent is compelled to abandon a prize at sea, and a neutral takes possession, the neutral is entitled to salvage, and the captors, and not the original owners, are entitled to the residue.<sup>2</sup> But if the belligerent voluntarily permits the neutral to take the prize, he must restore it to the owners, after deducting salvage.<sup>3</sup> And although the salvors made prize of the ship, and brought her in for condemnation, and it turned out that she was a friend, and not a subject for condemnation, this capture gave no ground for denying the services actually rendered.<sup>4</sup>

In a case where a city which had been blockaded was evacuated, and the blockading fleet took possession of the harbor, persons not of the navy, who, by their knowledge of the signals used in guiding blockade-runners, enticed such a vessel into the harbor and procured her capture by the fleet, were held entitled to compensation as salvage.<sup>5</sup>

<sup>1</sup> See *ante*, p. 316.

<sup>2</sup> *McDonough v. Dannery*, 3 Dall. 88. The vessel in this case had been captured and afterwards abandoned, and then brought into port by salvors. The salvors did not appeal from the decree of the district court, which awarded them one third of the gross proceeds of the property, and the case was carried to the Supreme Court to determine whether the captors or the original owners were entitled to the residue. The court held that the captors were, but expressed some doubts whether the salvors were not entitled to the whole of the property, or at least to a greater proportion than had been awarded them.

<sup>3</sup> *The Adventure*, 8 Cranch, 221; *The Sir Peter*, 2 Dods. 73; *The London*, *id.* 74.

<sup>4</sup> *The Franklin*, 4 Rob. Adm. 147.

<sup>5</sup> *The Deer*, U. S. D. C. Mass., 2 Am. Law Review, 101.



## CHAPTER IX.

## OF REPAIRS AND SUPPLIES.

We have already considered the lien of the material man at common law and by virtue of State statutes, and we propose now to consider the jurisdiction of our courts of admiralty over the subject of repairs and supplies and the various questions which arise when these subjects are presented in those courts.

By the general maritime law, and the civil law from which many of its provisions are derived, all material men have a lien on the ship.<sup>1</sup> This was asserted also and enforced in the admiralty courts in England, until they were compelled to abandon this jurisdiction in the reign of Charles II.<sup>2</sup> Since then, this lien has been confined in that country (until a statute passed in 1840 gave a lien to material men generally)<sup>3</sup> to the case of a shipwright or other person, to whom possession of the ship has been given for the purpose of repair, who has a common-law lien for his pay.

<sup>1</sup> Dig. 14, 1, 1; Cassaregia, Disc. 18; Ord. de la Mar. liv. 1, tit. 14, art. 16; 1 Valin, Com. 363; Consulat de la Mer, par Boucher, c. 32, 33, 34. It is generally stated that this principle of the maritime law is derived from the civil law. See *The General Smith*, 4 Wheat. 438, 443; *The Nestor*, 1 Sumner, 73, 79; *The Stephen Allen*, Blatchf. & H. Adm. 175, 177. But this has been shown to be incorrect. *The Young Mechanic*, 2 Curtis, C. C. 404; *The Calisto*, Daveis, 29, 31.

<sup>2</sup> In the case of *The Zodiac*, 1 Hagg. Adm. 320, 325, Lord *Stowell* remarked: "In most of the countries governed by the civil law, repairs and necessaries form a lien on the ship itself. In our country, the same doctrine had for a long time been held by the maritime courts, but, after a long contest, it was finally overthrown by the courts of common law, and by the highest judicature in the country, the House of Lords, in the reign of Charles II." See *Hoare v. Clement*, 2 Show. 338; *Justin v. Ballam*, 1 Salk. 34, 2 Ld. Raym. 805; *Watkinson v. Bernadiston*, 2 P. Wms. 367; *Wilkins v. Carmichael*, 1 Doug. 101; *Ex parte Shank*, 1 Atk. 234. See also *The Neptune*, 3 Hagg. Adm. 129, 140; *The John*, 3 Rob. Adm. 170.

<sup>3</sup> 3 & 4 Vict. c. 65, § 6. For decisions under this act see *The Alexander*, 1 W. Rob. 288; *The Sophie*, id. 368; *The Ocean Queen*, id. 457; *The Ocean*, 2 W. Rob. 368.

This lien or "privilegium," by the civil law and the general maritime law, extends to all ships without any distinction between foreign and domestic vessels.<sup>1</sup> In this country the law is now well settled that while the admiralty will take cognizance of suits *in rem* in the case of foreign vessels,<sup>2</sup> yet it will not enforce this remedy in the case of domestic vessels.<sup>3</sup> For many years our courts of admiralty entertained jurisdiction in the case of domestic vessels where a lien was given by a State statute,<sup>4</sup> or where the material man had a common-law lien growing out of possession.<sup>5</sup> And in 1844, the Supreme Court of the United States by an admiralty rule recognized this practice, and declared that there should be a proceeding *in rem* in the cases of domestic ships, where by the

<sup>1</sup> See *supra*, p. 322, n. 1.

<sup>2</sup> The *St. Jago de Cuba*, 9 Wheat. 409; *North v. Brig Eagle*, Bee, 78; *The Jerusalem*, 2 Gallis. 345; *Ex parte Lewis*, id. 483; *Zane v. The Brig President*, 4 Wash. C. C. 453; *The Gustavia*, Blatchf. & H. Adm. 189; *The Schooner Active*, Olcott, Adm. 286; *Cole v. The Atlantic*, Crabbe, 440; *Tree v. The Indiana*, id. 479.

<sup>3</sup> The *St. Jago de Cuba*, 9 Wheat. 409; *Turnbull v. The Ship Enterprize*, Bee, 345.

<sup>4</sup> *Peyroux v. Howard*, 7 Pet. 324; *Weaver v. The S. G. Owens*, 1 Wallace, C. C. 358; *Sutton v. The Albatross*, 2 id. 327; *Raymond v. Schooner Ellen Stewart*, 5 McLean, C. C. 269; *The Ferax*, 1 Sprague, 180; *Phillips v. The Thomas Scattergood*, Gilpin, 7; *The Sam Slick*, 1 Sprague, 289. In *Boon v. The Hornet*, Crabbe, 426, a canal-boat built and used for service in the interior canals of Pennsylvania was hauled on shore on the bank of a river where the tide ebbed and flowed, and there repaired. Held, that although the law of the State gave a lien on vessels for all debts incurred on their account, the court would not take cognizance of such a service, the employment of the vessel not being maritime in its character; and the general rule was laid down that while the court would take cognizance under a State law of all contracts or charges of an admiralty or maritime nature, notwithstanding no lien was given therefor by the general maritime law, it would not of contracts or charges not of an admiralty or maritime nature, although a lien was given therefor by such State statute.

<sup>5</sup> The *Schooner Marion*, 1 Story, 68, 72. The case of *Peyroux v. Howard*, 7 Pet. 324, seems to rest upon this principle, for the Civil Code of Louisiana, under which the case was decided, gives no greater privilege than a material man has in other States by the common law. But if the possession is parted with, it is well settled that this lien is gone. *The General Smith*, 4 Wheat. 438; *The St. Jago de Cuba*, 9 id. 409; *Buddington v. Stewart*, 14 Conn. 404; *Boon v. The Hornet*, Crabbe, 426; *Tree v. The Indiana*, id. 479; *The Stephen Allen*, Blatchf. & H. Adm. 175; *Turnbull v. The Ship Enterprize*, Bee, 345; *Clinton v. The Brig Hannah*, id. 419.

local law a lien is given to material men for supplies, repairs, or other necessities.<sup>1</sup> Subsequently, however, by a rule which went into effect May 1, 1859, a proceeding *in personam* but not *in rem* is allowed in cases of domestic ships for supplies, repairs, or other necessities.<sup>2</sup> The lien given by the State law has been enforced since the passage of this rule in two cases where the libel was filed before the rule went into effect.<sup>3</sup>

It is very obvious, however, that the State legislatures have no power to confer any additional jurisdiction upon the United States courts;<sup>4</sup> and it is only where the lien given by the State statute is, in respect to a subject which is maritime in its nature that admiralty process will lie to enforce it. Thus the Supreme Court of the United States has refused to enforce a lien given by a State statute for building a vessel.<sup>5</sup>

In cases where the lien given by a State statute could be enforced in admiralty, the court, in applying the statute and enforcing the lien, would doubtless be governed by the terms of that statute, and not by the maritime law generally, wherever those terms were explicit.<sup>6</sup> But in construing those terms where

<sup>1</sup> 12 Admiralty Rule, 3 How. vi.

<sup>2</sup> 21 How. iv.

<sup>3</sup> The *St. Lawrence*, 1 Black, 522. See also The *Potomac*, 2 id. 581. Previous to this rule, it had been decided that under the 12th old admiralty rule, no action *in personam* would lie in the case of a domestic vessel. *Merritt v. Sackett*, U. S. D. C. Western District of New York, 12 Law Rep. 511. In *Maguire v. Card*, 21 How. 248, the court refused to enforce a lien given by a State law against a vessel which was engaged in trade exclusively within the State of California. This was before the new rule went into effect. *Nelson, J.*, delivering the opinion of the court said: "We have determined to leave all these liens depending upon State laws, and not arising out of the maritime contract, to be enforced by the State courts." This decision was followed in *The Troy*, 4 Blatchf. C. C. 755.

<sup>4</sup> See *ante*, p. 172, n. 2.

<sup>5</sup> *Roach v. Chapman*, 22 How. 129. A similar decision was given by Judge *Betts* in *The Sch. Coernine*, U. S. D. C. New York, 1858, 21 Law Rep. 343, 7 Am. Law Reg. 5. We shall hereafter consider the question, whether a contract for the building of a vessel is maritime in its nature. See *post*, p. 328, n. 1.

<sup>6</sup> The *General Smith*, 4 Wheat. 438; The *Barque Chusan*, 2 Story, 455, 462; The *Ship Robert Fulton*, 1 Paine, C. C. 620, 626; The *Calisto*, *Daveis*, 29, 33; The *Stephen Allen*, *Blatchf. & H. Adm.* 175, 179; *Harper v. The New Brig, Gilpin*, 536; *Tree v. The Indiana*, *Crabbe*, 476; The *Young Sam*, U. S. C. C. Maine, 20 Law Rep. 608.

doubtful, they would probably be influenced by admiralty principles, and would doubtless apply them to a case distinctly before them, although the case itself might not come within their jurisdiction, except by force of the statute.<sup>1</sup>

What is a foreign vessel is sometimes a question of difficulty. In one case the vessel was built in New York on account of persons residing in South America. She was never documented as an American bottom, and was cleared and went to sea as the property of foreigners. Shortly after she met with a disaster at sea and returned to New York, where she was arrested on account of provisions furnished her before she sailed. It was contended that as she was built in New York she was a domestic vessel, but the court held that she was a foreign vessel.<sup>2</sup>

If a vessel is in her home port, but held out by her owners as a foreign vessel, it seems that material men, who repair her, or furnish supplies, will have a lien, if the imposition practised upon them is such as to mislead men of ordinary vigilance.<sup>3</sup>

For the purposes of the distinction between foreign and domestic vessels, each of our States is considered foreign as to the rest.<sup>4</sup>

If it is in controversy to which State a vessel belongs, the enrolment made under oath by the managing owner, pursuant to the

<sup>1</sup> See *The Richard Busteed*, 1 Sprague, 449; *Boon v. The Hornet*, Crabbe, 426.

<sup>2</sup> *The Active*, Olcott, Adm. 286. See also *Parmlee v. The Charles Mears*, 1 Newb. Adm. 197. But in *Scott v. The Plymouth*, 1 Newb. Adm. 56, 6 McLean, C. C. 463, it was held that a vessel built at Cleveland under a contract with parties resident at Buffalo, in New York, belonged to Cleveland until after her delivery and first voyage.

<sup>3</sup> *The St. Jago de Cuba*, 9 Wheat. 409. So if a vessel puts into an enemy's port, and pretends to be a neutral, her owners are liable. *Musson v. Fales*, 16 Mass. 332.

<sup>4</sup> This doctrine has grown out of a *dictum* in the case of *The General Smith*, 4 Wheat. 438, but it may be considered as settled. See *Pratt v. Reed*, 19 How. 359; *The Brig Nestor*, 1 Sumner, 78; *The Barque Chusan*, 1 Sprague, 39, 2 Story, 455; *Leland v. The Ship Medora*, 2 Woodb. & M. 92; *Davis v. Child*, Davis, 71; *Sarchet v. The Sloop Davis*, Crabbe, 185; *The Stephen Allen*, Blatchf. & H. Adm. 175; *The Monsoon*, 1 Sprague, 37; *Reeder v. The Steamship George's Creek*, U. S. D. C. Maryland, 3 Am. Law Reg. 232; *Dudley v. The Steamboat Superior*, 1 Newb. Adm. 176; *Leddo v. Hughes*, 15 Ill. 41; *Ross v. Steamboat Neversink*, U. S. D. C. New York, *Shipman*, J., December, 1866, affirmed by *Nelson*, J., November, 1867; *Carter v. Sch. Byzantium*, 1 Clifford, C. C. 1. See also *ante*, p. 9, n. 1.

act of Congress requiring it to be made at the port nearest the residence of the owner, is *prima facie* evidence that the vessel belonged to that port, and will require clear proof of the notorious residence of the owner or owners at some other place to overcome it; and the presumption is strengthened by the fact that the boat has on its stern its registered name, and the name of the port of enrolment.<sup>1</sup>

It has been doubted whether a vessel built in one State, where her owner lived, and taken to another State to be rigged, without being enrolled or licensed, can be considered as a foreign vessel, so as to give the court jurisdiction.<sup>2</sup>

The residence of the owners of the vessel, and not that of the furnisher, is to be looked to, in determining whether the vessel is a domestic one or not. Therefore, if the vessel is in her home port, no lien exists for the supplies there furnished, although the furnisher resides and does business in another State.<sup>3</sup> So where

<sup>1</sup> *Dudley v. Steamboat Superior*, 1 Newb. Adm. 176. In *Tree v. The Indiana, Crabbe*, 479, the enrolment was considered as conclusive. But this position was held to be incorrect in *Hill v. The Golden Gate*, 1 Newb. Adm. 308. In *The Sarah Starr*, 1 Sprague, 453, the vessel was built in Connecticut, under a contract of which the purchaser was to pay a small part of the purchase-money in cash, and the residue by instalments, and upon the payment of the whole he was to have a bill of sale. The title was to remain in the builders until full payment had been made, but the purchaser was to have possession until he made default of some payment. Possession was delivered to the purchaser, who ran her for nearly three years. He lived in New Jersey, but had a place of business in New York. The vessel was enrolled and licensed at a custom-house in Connecticut as owned by the builders. At the time the supplies were furnished in New York, the purchaser had let the vessel to the master on shares. Held, the vessel was to be considered as owned in Connecticut, and therefore was a foreign one.

<sup>2</sup> Per *Taney*, C. J., U. S. C. C. Delaware, in a case mentioned in *Sarchet v. The Sloop Davis, Crabbe*, 185.

<sup>3</sup> *The Eliza Jane*, 1 Sprague, 132. In *Weaver v. The S. G. Owens*, 1 Wallace, C. C. 359, it was said that the residence of the owner determined whether a vessel was domestic or not, and for this purpose the person rightfully in possession, or having the control of the vessel by appointing the officers, would be considered as owner, whether he was lessee, mortgagee, or parol vendee, even though some other person might be the registered owner and have the legal title or general ownership in himself. And in *Hill v. The Golden Gate*, 1 Newb. Adm. 308, the charterers who were in possession were considered as the owners, and the supplies being furnished in the port where they resided, the vessel was held not to be liable. But in *Thomas v. Osborn*, 19 How. 22, 29, it was held that the master, though he was the charterer, could bind the vessel for necessary repairs in a foreign port.

the vessel was owned in New York, and the material men also lived and did business there, but the supplies were furnished through their agent in New Jersey, where the vessel was at the time, it was held that the vessel was liable.<sup>1</sup>

A ship-broker has a lien on a foreign vessel in the nature of the lien of a material man for services in shipping the crew of a vessel, and for advances for their wages.<sup>2</sup> The consignee of a vessel in a foreign port, who has no funds of the ship in his hands, has a lien on the ship for necessary supplies furnished on the credit of the ship.<sup>3</sup> In one case, the owners of a vessel, the master of which had furnished a chain and anchor to another vessel in a foreign port, were held to have a lien on the second vessel for the supplies.<sup>4</sup>

A person who lends money for the purpose of repairing a vessel, or of furnishing her with supplies, and which is actually employed for that purpose, is entitled to the same privilege against the vessel as one who actually furnishes the supplies, or performs the labor.<sup>5</sup>

It has been held that the owner of a ship-yard who employs a railway cradle and other fixtures and implements for hauling a vessel out of the water, can sue in admiralty for his services, although the vessel is repaired by other parties.<sup>6</sup>

Can the builder of a ship sue in admiralty for a breach of the contract? We know of no reason on principle why there should be any difference between a contract for building, and a contract for repairing, and should hold that, while a lien cannot be enforced for building if the builders and owners of the vessel reside in the same State, the admiralty should have jurisdiction where the parties to the contract live in different States, and that in cases of domestic vessels the admiralty should exercise jurisdiction *in personam*, as we regard the building of a

<sup>1</sup> *Morris v. The Neverink*, U. S. D. C. New York, 1866, *Shipman*, J.

<sup>2</sup> *The Gustavia*, Blatchf. & H. Adm. 189. The court said, "The contract has all the constituents of a maritime contract. It had respect to the equipment of a foreign vessel for sea service, and may accordingly be prosecuted in this court, and carry with it the privileges appertaining to suits by material men."

<sup>3</sup> *The Eliza Jane*, 1 Sprague, 152.

<sup>4</sup> *The Sea Lark*, 1 Sprague, 571.

<sup>5</sup> See *ante*, p. 16, n. 3.

<sup>6</sup> *Wortman v. Griffith*, 8 Blatchf. C. C. 528.

vessel as much a maritime transaction as the repairing of the vessel.

We are, however, constrained by authority to say that admiralty has no jurisdiction of a contract to build a vessel, whether it is domestic or foreign, or whether the lien is given by a State statute or not,<sup>1</sup> and has no jurisdiction *in personam* over such a contract.<sup>2</sup>

<sup>1</sup> The lien given by a State statute to persons building a vessel, has been enforced in admiralty in numerous cases. The *Calisto*, Daveis, 29, s. c. *nom.* Read v. The Hull of a New Brig, 1 Story, 244; The Hull of a New Ship, Daveis, 199; The Young Mechanic, Ware, 2d ed. 585, 2 Curtis, C. C. 404; The *Kearsarge*, Ware, 2d ed. 546, 2 Curtis, C. C. 421; *Purinton v. The Hull of a New Ship*, Ware, 2d ed. 556, 2 Curtis, C. C. 416; *Sewall v. The Hull of a New Ship*, Ware, 2d ed. 585; *Davis v. A New Brig*, Gilpin, 473. In *Clinton v. Brig Hannah*, Bee, 419, it was held that a shipwright could not sue *in rem* for his wages for building a vessel. And in a case before *Taney*, C. J., in the United States Circuit Court of Delaware, cited in *Crabbe*, 199, it was doubted whether the rigging of a new vessel came within the views or language of the maritime laws which give a lien to material men for repairs. But in *Parmlee v. The Charles Mears*, 1 Newb. Adm. 197, a contract for building a vessel, made with the owners in another State, was enforced. This question came before the court in *People's Ferry Co. v. Beers*, 20 How. 393. The libel was filed against the vessel *in rem* to recover the balance due on a contract for building the vessel. The libellant resided in New Jersey, and the respondent in New York. The vessel was built in New Jersey and delivered to the owner in New York previous to the bringing of this action. There was no lien given by any New Jersey statute, and the only question was whether the contract for building a vessel was of such a maritime nature that it could be enforced in admiralty. The court said: "The lien attaches to foreign ships and vessels only in favor of the carpenter who repairs in a case of necessity, and in the absence of the owner. It would be a strange doctrine to hold the ship bound, in a case where the owner made the contract in writing, charging himself to pay by instalments for building the vessel at a time when she was neither registered nor licensed as a sea-going ship. So far from the contract being purely maritime, and touching rights and duties appertaining to navigation (on the ocean or elsewhere), it was a contract made on land, to be performed on land." The libel was dismissed. In *The Richard Busted*, 1 Sprague, 441, it was decided that a lien given by a statute of Massachu-

<sup>2</sup> In *Cunningham v. Hall*, 1 Clifford, C. C. 43, 46, the question presented was thus stated by the court: "Whether the purchaser of a ship, constructed for him under a written contract, after he has paid the consideration and accepted the ship, and fitted her as a sea-going vessel, may maintain in the district court a suit *in personam* for damages against the builder for the non-completion of the ship according to the contract, on account of defects in the construction which were discovered subsequent to her delivery and employment on a foreign voyage." The libel was dismissed.

Before the year 1856, the law, in regard to the necessity which would authorize material men to trust to a foreign vessel, and which would create a lien upon her, was well settled. It is thus stated by Judge Sprague: "It was requisite, first, that the vessel should need the supplies, or that, after reasonable inquiry, she should appear to need them; and secondly, that in giving credit to the vessel and owners, the material man should act in good faith; and he would not be deemed to act in good faith, if he knew that the master had funds wherewith to pay for the supplies, or if facts were known to him which should create suspicions, and put him upon inquiry, when such inquiry would have led to the knowledge that the master had funds, and had no right, therefore, to obtain supplies on credit. That is, if the material man had knowl-

setts for labor in building a vessel, could be enforced in admiralty. The case of *The People's Ferry Company v. Beers*, 20 How. 393, was reviewed at length, and the learned judge came to the conclusion that the contract for building a vessel is a maritime contract, and if a lien is given by a State court it should be enforced in admiralty. In the above case of the *People's Ferry Co. v. Beers*, 20 How. 393, the court said: "It is proper, however, to notice the fact, that district courts have recognized the existence of admiralty jurisdiction *in rem* against a vessel to enforce a carpenter's bill for work and materials furnished in constructing it, in cases where a lien had been created by the local law of the State where the vessel was built. Thus far, however, in our judicial history, no case of the kind has been sanctioned by this court." Judge *Betts* has acted upon the above suggestion by holding that the lien given by a State statute for building and equipping a vessel cannot be enforced in admiralty. *The Sch. Coernine*, U. S. D. C. New York, 1858, 21 Law Rep. 343, 7 Am. Law Reg. 5. A contrary decision was given in the case of *The Revenue Cutter No. 1*, U. S. D. C. Ohio, 21 Law Rep. 281. An action was brought *in rem* by a person furnishing materials to the original contractor, under the statute of Ohio, which gives a lien to parties building a vessel, and to those who furnish materials for building. The assignees of the original builders intervened as claimants, alleging a lien by virtue of their contract with the owner. The court held that as the contract between the builders and owners was not a maritime contract, no lien existed in their favor; that there was no privity of contract between the libellant and the owner, but for the supplies furnished to the builders a lien was given by the State law, which could be enforced in admiralty. But in a more recent case the Supreme Court state the rule positively that "A contract for building a ship or supplying engines, timber, or other materials for her construction is clearly not a maritime contract." The libellant in this case had supplied the boilers and engines of the boat when she was built, and brought this action *in rem* to enforce the lien given by the State law. The suit was brought before the new 12th admiralty rule went into operation, but it was held that it could not be maintained. *Roach v. Chapman*, 22 How. 129.



edge that the master was acting in bad faith toward his employers, or knew of circumstances which ought to admonish him to make inquiry that would have led to such knowledge, then he would be affected with bad faith, as colluding with the master, and aiding him in violating his duty to his owner. But if the material man had no reason to suppose that the master was violating his duty in obtaining a credit, he might, upon request of the master, trust to the vessel and owners, and a lien would thereby be created. The further inquiry, whether, if credit were necessary, it would not be practicable to obtain the supplies upon the mere personal responsibility of the owner, was never required or even suggested. The right to trust a vessel, where the credit was properly given, was a matter of course. This was for the benefit of the owners; for the greater the security where credit is given, the better the terms, and to a foreign owner this would rarely be unimportant, however good his personal credit might be, for some apprehensions as to the continued solvency of persons engaged in commerce are never absent from the prudent seller."<sup>1</sup>

In 1856 two cases were decided by the Supreme Court of the United States, which have been supposed to essentially change the law applicable to material men. The first of these<sup>2</sup> was a suit *in rem* to recover for supplies and repairs furnished the vessel at Valparaiso, the vessel being owned in Plymouth, Massachusetts. The majority of the court held on the facts that the master had deserted his duty, and used the vessel for his own purposes, and appropriated her earnings, all of which facts were known to the persons furnishing the repairs and supplies, and that the libellants were not entitled to recover. This case, therefore, made no change in the law. There are, however, *dicta* in the case which seem at variance with the previously well-established law, but taken in connection with the facts in the case they do not seem to be intended to make this change.<sup>3</sup>

<sup>1</sup> The Sarah Starr, 1 Sprague, 455.

<sup>2</sup> Thomas v. Osborn, 19 How. 22.

<sup>3</sup> These *dicta* are as follows: on p. 30, "But the limitation of the authority of the master to cases of necessity, not only of repairs and supplies, but of credit to obtain them, and the requirement that the lender or furnisher should see to it that apparently such a case of necessity exists, are as ancient and well established as the authority itself." And on p. 31: "To constitute a case of apparent necessity,

In the next case,<sup>1</sup> the vessel belonged at Buffalo, in the State of New York, as her home port, and the debt was contracted at Erie, in the State of Pennsylvania. The demand claimed in the libel was a running account for coal furnished a steamboat, from June, 1852, to May, 1854. The master of the boat was the sole owner. The answer denied that the supplies were furnished on the credit of the boat, and averred that they were furnished on the credit of the master. There does not appear from the report to have been any evidence that the coal was furnished on the credit of the boat. The libel was dismissed, on the ground that there was no proof to show that there was a necessity for a credit on the vessel.<sup>2</sup>

Since the decision of the Supreme Court of the United States in

not only must the repairs and supplies be needful, but it must be apparently necessary for the master to have a credit, to procure them. If the master has funds of his own, which he ought to apply to purchase the supplies which he is bound by the contract of hiring to furnish himself, and if he has funds of the owners, which he ought to apply to pay for the repairs, then no case of actual necessity to have a credit exists. And if the lender knows these facts, or has the means, by the use of due diligence, to ascertain them, then no case of apparent necessity exists to have a credit; and the act of the master in procuring a credit does not bind the interest of the general owners in the vessel." See remarks of Judge *Sprague* on these *dicta*, in *The Sarah Starr*, 1 *Sprague*, 458, 459.

<sup>1</sup> *Pratt v. Reed*, 19 *How*. 359.

<sup>2</sup> *Nelson, J.* in this case said: "But the more serious difficulty in the case, on the part of the libellant, is the entire absence of any proof to show that there was also a necessity at the time of procuring the supplies, for a credit upon the vessel. This proof is as essential as that of the necessity of the article itself. The vessel is not subject to a lien for a common debt of the master or owner. It is only under very special circumstances, and in an unforeseen and unexpected emergency, that an implied maritime hypothecation can be created. It seems also to be supposed that circumstances of less pressing necessity for supplies or repairs, and an implied hypothecation of the vessel to procure them, will satisfy the rule, than in a case of necessity sufficient to justify a loan of money on bottomry, for the like purpose. We think this a misapprehension. The only difference is, that before a bottomry bond can be given an additional fact must appear; namely, that the master could not procure the money without giving the extraordinary interest incident to that species of security. This distinction was attempted in the case of *The Alexander*, 1 *W. Rob.* 336, but was rejected by *Dr. Lushington*. A principle excluding any such distinction, has been laid down in the case of *Thomas v. Osborn*." The case of *The Alexander* does not contain any reference whatsoever to the point for which it is cited, nor is there anything in the case of *Thomas v. Osborn*, to sustain the proposition that the libellant must show a necessity for a credit on the owners.

the case of *Pratt v. Reed*, three questions are presented when it is sought to enforce a lien upon the vessel. First, were the supplies or repairs necessary? Second, were they furnished on the credit of the vessel? Third, was there a necessity for a credit on the vessel?

First, as to the necessity of the supplies or repairs. The law is well settled, that whatever is reasonably fit and proper for the use of a vessel in her navigation, is deemed necessary;<sup>1</sup> or as it has been said, that is deemed necessary which a careful and prudent owner would supply.<sup>2</sup>

Though the vessel is in a foreign port, yet if the owners are present,<sup>3</sup> or if they have an agent there, who will advance what is necessary,<sup>4</sup> the master has no authority to bind the vessel, but this rule does not apply to the master if he is also a charterer,<sup>5</sup> or even if he be part owner.<sup>6</sup>

If, by the terms of the charter-party, the charterer becomes her owner for the voyage, the agent of the charterer can bind the vessel for supplies furnished at a foreign port, although the person furnishing the coal knew of the charter, and knew that, according

<sup>1</sup> See *ante*, p. 14, 15.

<sup>2</sup> *The Alexander*, 1 W. Rob. 346. In *Sarchet v. The Sloop Davis*, Crabbe, 185, a chain cable was loaned by its maker to a master for the use of his vessel, under an agreement that it should be returned when another chain cable had been made and delivered on board. The second cable was made and delivered on board, when the master agreed to return the first in a specified time. Before this time arrived the vessel sailed, and the cable was never returned. The court held that the vessel was liable for both. Water casks are included in "materials." *Zane v. The Brig President*, 4 Wash. C. C. 453.

<sup>3</sup> *Shrewsbury v. Sloop Two Friends*, Bee, 433; *The St. Jago de Cuba*, 9 Wheat. 409, per *Johnson, J.* The case of *North v. Brig Eagle*, Bee, 78, is perfectly consistent with these cases, for the supplies were furnished on the express stipulation that the vessel should be liable, and the owners were not known. See also *Williams v. The Polly*, cited Bee, 168.

<sup>4</sup> *Boreal v. The Golden Rose*, Bee, 131; *Pritchard v. Schooner Lady Horatia*, id. 167.

<sup>5</sup> *Thomas v. Osborn*, 19 How. 22; *The Nestor*, 1 Sumner, 73; *Ross v. Steamboat Neversink*, U. S. D. C. New York, 1866, *Shipman, J.*

<sup>6</sup> In *Pratt v. Reed*, 19 How. 361, *Nelson, J.* said: "We do not say that the mere fact of the master being owner of itself excludes the possibility of a case of necessity that would justify an implied hypothecation; but it is undoubtedly a circumstance that should be attended to in ascertaining whether any such necessity existed in the particular case."

to its terms, the charterer was bound to furnish coal for the voyage.<sup>1</sup> And if the vessel is in a foreign port, and the owner is present and orders supplies, this will give a lien on the vessel, if the owner has no funds.<sup>2</sup>

Second, as to credit being given to the vessel. This is a matter of fact to be ascertained from all the evidence in the case. Evidence that the debt is charged to the vessel and owners on the books of the person claiming a lien is admissible to show that credit was given to the vessel.<sup>3</sup> It has been said that if supplies are furnished to a foreign vessel, they are deemed to be furnished on the credit of the ship and owners, until the contrary is proved.<sup>4</sup>

In one case, where the master testified that there was nothing said one way or the other as whether the ship would be liable for the payment, Judge Sprague said: "It is not necessary that the ship should be, in terms, made liable for the payment. There is nothing in the recent case to disturb the old doctrine that a tacit lien arises when the circumstances necessary to create it exist."<sup>5</sup>

In a case where coal was furnished a steamboat from time to time, and part of it was paid for by the master from the earnings of the boat, it was held that this did not exonerate the boat.<sup>6</sup>

<sup>1</sup> The City of New York, 3 Blatchf. C. C. 187.

<sup>2</sup> The James Guy, 1 Bened. Adm. 112.

<sup>3</sup> The Chusan, 2 Story, C. C. 468; *Ross v. Steamboat Neversink*, U. S. D. C. New York, 1866, *Shipman, J.*; The Prospect, 3 Blatchf. C. C. 526; The James Guy, 1 Bened. Adm. 112.

<sup>4</sup> The Nestor, 1 Sumner, 73; The Prospect, 3 Blatchf. C. C. 526.

<sup>5</sup> The Sea Lark, 1 Sprague, 573.

<sup>6</sup> *Ross v. Steamboat Neversink*, U. S. D. C. New York, 1866, *Shipman, J.* said "No doubt Capt. Thornell intended to pay for the coal out of the earnings of the boat (and he did in fact pay some), but I find nothing in the proof to warrant the inference that either he or the libellants understood that the contract rested on his personal credit." See also *The James Guy*, 1 Bened. Adm. 112. In *Boyce v. Steamer Patapsco*, U. S. D. C. New York, *Shipman, J.*, the libellant sought to hold the steamer liable for coal furnished in Baltimore. The steamer was running in a line between New York and Baltimore. There was an agent of the company in Baltimore who attended to the business there, including the purchasing of supplies. Coal was purchased from time to time of different parties, and among others of the libellant, and bills were made out to the company and sent in monthly, and were all paid by the agent except the bills for two months. The court said: "The libellant dealt, not with the master of the vessel, but with the accredited agent of the company, resident in Baltimore. I think that it is clear that he looked to the company generally, and not to the particular ship, for his pay." The libel was dismissed.

Third, as to the necessity of the credit. It has been held in some cases, since the decision of *Pratt v. Reed*, that the libel must set forth that the supplies or repairs could not have been procured on the credit of the owners;<sup>1</sup> and there must be some evidence to sustain this allegation.<sup>2</sup> But what evidence is necessary, or how far the persons claiming a lien are bound to prove a negative, is yet undecided. Suppose a British vessel is in New York, and supplies are furnished, the material men knowing nothing about her owners or their credit, of how many men are they bound to inquire respecting the credit of the owners, and what evidence must they produce to satisfy the court that the owners had no credit? It might well be held, in such a case, that the presumption was that the owners had no credit, and that the burden was on the claimants to prove that they had a credit.

In a case in New York the vessel was under a charter, and the charterers had no credit, though it was claimed that the general owner had. It was held that since the master could not bind the general owner personally, the question of his credit was immaterial, and the vessel could be held by proof that the charterers had no

<sup>1</sup> *The Sarah Starr*, 1 Sprague, 461; *Brown v. Propeller Albany*, U. S. D. C. New York, Boston Courier, Feb. 13, 1858.

<sup>2</sup> *The Sarah Starr*, 1 Sprague, 453. In *Boyce v. Steamer Patapsco*, U. S. D. C. New York, *Shipman*, J., said: "There is no satisfactory proof of a necessity apparent at the time for resorting to the credit of the ship. There is proof that the affairs of the company were in fact in a state of embarrassment, and approaching the crisis of insolvency. But the proof fails to show that they had not sufficient credit in Baltimore to obtain supplies for their ships at that port. That fact must be clearly proved before this court can assume that the credit of each ship was or could be resorted to in order to obtain the supplies furnished to such vessel." For the facts of this case see p. 333, n. 6. In *Taff v. Brig Eledona*, U. S. D. C. New York, 1867, *Blatchford*, J., a vessel belonging to Halifax, Nova Scotia, was at New York, and in need of some repairs and a new mast. The master made a written contract with shipwrights to make the repairs and furnish the mast; and he paid the bill, including the cost of the mast, with his own money. The mast was not in fact furnished by the contracting parties, but by the libellant, who supposed he was furnishing it on the order of the master, and he made out a bill for it to the vessel and owners. He made no inquiries as to whether the vessel needed the mast, or as to whether the master had means or credit, or as to whether it was necessary for the master to obtain it on the credit of the vessel. Held, that the vessel was not liable *in rem*, as it appeared that the master had funds to pay for the repairs.

credit.<sup>1</sup> This case was affirmed on appeal, by Mr. Justice Nelson.<sup>2</sup>

<sup>1</sup> *Ross v. Steamboat Neversink*, U. S. D. C. New York, 1866. The vessel belonged to New York and the supplies were furnished at New Brunswick, in the State of New Jersey. *Shipman, J.*, said: "Now it appears from the proofs that the master had no funds of the general owner, and therefore could apply none to the purchase of this coal. An effort was made on the trial to prove that White, the general owner, was well known in New Brunswick, where the coal was purchased, to be a man of property, and that he had a credit there to which the master might have resorted. This attempt failed, for only one person there is proved to have known him. But if he was ever so well known there, and had undoubted credit in that market, it is difficult to see how this fact could tend to prove that no necessity existed for the master to resort to the credit of the boat; for he, being charterer, could not have bound the owner personally, and, therefore, the credit of the owner would have been of no avail to the master. This would have certainly been the case had the general owner been known to the libellants, and with reasonable diligence they could have ascertained that Thornal and Hine were special owners. The master would then not have been apparently the agent of the general owner, and therefore could not have made a valid contract on his behalf, or one by which he would have been bound. It appears that, at the time of the purchase of this coal, Thornal had in his hands, arising out of the current earnings of the boat, three or four hundred dollars, but he at the same time had other and pressing demands arising out of the necessary and daily wants of the boat. The crew were to be paid, and a multitude of items which go to make up the running expenses of such a boat to be attended to. This small amount was no more than a prudent man engaged in such an enterprise ought to have kept on hand from day to day. The only other evidence touching the pecuniary ability of the master simply shows that he was engaged in a heavy speculation in oats, and had twelve or fourteen thousand dollars invested in it, carrying, as he says, a large quantity on a margin. This speculation was not in New Brunswick where this coal was purchased, but in New York or Brooklyn. These oats or the speculative contract relating to them, were not available funds in the hands of the master, such as the maritime law regards as sufficient to take away his authority to resort to the credit of his vessel. Whether he could have disposed of his interest in this speculation in the then state of the market, and had a dollar left, does not appear. The conclusion on the whole case is that he bound the boat in this contract with the libellants."

<sup>2</sup> *Ross v. Steamboat Neversink*, U. S. C. C. New York, Nov. 1867. *Nelson, J.*, said: "The main ground of controversy is whether or not there is sufficient evidence of an apparent necessity existing at the time within the rule of the maritime law." After referring to *Pratt v. Reed*, and the rule there laid down, the learned judge said: "Applying it to the case in hand we are satisfied that the proofs show an apparent necessity for the credit in question. The master had no funds to meet the payment for the coal as delivered; and the owners and the charterers were not present, but resided at a distance, and, in the sense of the

The fact that the Supreme Court of the United States has, since the decision in *Pratt v. Reed*, re-enacted the twelfth admiralty rule, does not show an intention on the part of the court to change

maritime law, in a foreign jurisdiction. The master was one of the charterers, but this does not affect his authority as master. He had no means either as master or owner, which makes the apparent necessity for the credit to the vessel the stronger. I lay out of view the general owner, because the master was not his agent, and could bind him by no act of his; he could only bind the vessel and the charterers. As to the sufficiency of the proofs of this apparent necessity, no fixed rule, from the great diversity of the cases that arise, can be laid down in advance. It must necessarily rest in the sound judgment of the tribunal before which the proofs are presented. Good faith and fair dealing are expected on the part of the person furnishing these supplies in every case, and the absent owner should be guarded against collusion of the master with the material man, or furnisher of supplies, and against an unnecessary tacit incumbrance upon his vessel." In *The Steamboat James Guy*, U. S. C. C. New York, Sept. 1867, the vessel was owned in New York, and was repaired in Baltimore. The owners claimed that the repairs were not furnished on the credit of the vessel, and that there was no necessity for giving credit to the boat, as the owners were in good credit at the time. *Nelson, J.*: "The main question in this case is whether the steamboat is subject to a lien for the bill of repairs put upon her by the libellants, and that turns upon the point whether the credit was given to the vessel or to the owner, and after a very full examination of the evidence, I am satisfied that it was the intention of both parties that the payment was to be made when the repairs were finished, and that in the mean time the mechanic or workman looked to the vessel as security. It is needless to go over the proofs in support of this conclusion. All the facts and circumstances attending and surrounding the case tend in this direction. It is supposed by the counsel for the respondents that the case of *Pratt v. Reed*, 19 How. 359, has an important bearing in this case adversely to the lien. We do not so understand it. The necessity for repairs or lien upon the vessel to enable the master to procure them, are insisted upon there as essential elements to support the lien, and in respect to the soundness of which there can be no controversy; but the necessity in both instances (for repairs and lien) must depend upon the facts and circumstances of the case. In *Pratt v. Reed* they repelled the necessity of the lien. In the present case we hold they support it." In the same case before the district court, *The James Guy*, 1 Bened. Adm. 112, the objection was taken that it had not been made to appear that the owner was without credit in Baltimore. *Benedict, J.*, said: "Now, with the most sincere desire to give to this (*Pratt v. Reed*) and all other decisions of the appellate court their full force and effect as the authoritative guides of the court below, I find it difficult to consider the case of *Pratt v. Reed* as deciding more than this: that when the circumstances of the case are such as to raise a presumption that there was no necessity for an implied hypothecation, it then becomes incumbent on the libellant to show a necessity for a credit." And *Benedict, J.*, held that it was sufficient to show that the owner was insolvent, without showing that he had no credit in Baltimore.

the rule laid down in *Pratt v. Reed*. The rule does not give a right to sue in all cases of supplies furnished a foreign ship, but only regulates the remedy in cases where the right exists.<sup>1</sup>

In a case in Massachusetts, a chain and anchor were furnished a vessel by another at the Chinch Islands. The credit of the owner of the vessel supplied was not good in Boston, where he lived, at the time the chain and anchor were furnished, and had not been for two years before that time. There were no mercantile houses or persons resident at the Chinch Islands whose business or practice it was to lend money or furnish supplies to owners of vessels. The master drew upon the owner twice during the voyage, once at Callao and once at the Chinchas, and sold the drafts at a premium, but it did not appear that credit was given or the drafts taken without a lien upon the vessel. The owner testified that he got credit after these articles were furnished, but it appeared that it was only for premiums of insurance. It was held that it was sufficiently proved that these necessary supplies could not have been obtained upon the personal credit of the owner, and that a lien therefore attached to the vessel.<sup>2</sup>

The lien of a material man takes precedence of the claims of other creditors.<sup>3</sup> And if the vessel is wrecked, and portions of the wreck are saved by the owners, the lien attaches to what is saved, and will be paid after the claims of the seamen are satisfied.<sup>4</sup> This lien is lost by the capture of the vessel *jure belli*.<sup>5</sup>

<sup>1</sup> *Taff v. The Brig Eledona*, U. S. D. C. New York, 1867, *Blatchford*, J.

<sup>2</sup> *The Sea Lark*, 1 *Sprague*, 571.

<sup>3</sup> *The Granite State*, 1 *Sprague*, 277; *The Sea Lark*, 1 *Sprague*, 571.

<sup>4</sup> *Bruce v. The Tackle, etc. of the Steamboat America*, 1 *Newb. Adm.* 195.

<sup>5</sup> *The Battle*, 6 *Wallace*, 498.



## CHAPTER X.

## OF SALE BY ORDER OF ADMIRALTY.

THIS occurs principally in cases of bottomry and of salvage, when the court always decree a sale, if necessary, to satisfy the claims which they sustain. Doubtless the same decree would be made in any suit *in rem* against the ship, where the same necessity arose; as for wages or repairs. Wherever a sale is decreed, the court give such orders, and take such precautions, as may seem necessary and proper to protect the interests of all parties; and such a sale, it would seem, conveys the property free from all prior incumbrances.<sup>1</sup> And it has been held that a sale by the master, through necessity, has this effect.<sup>2</sup> But where the process is *in personam*, and goods are attached which are afterwards sold, such sale passes only the property of the respondent.<sup>3</sup>

In judicial sales, there is no warranty either express or implied; and the proceeds when brought into court are not liable *in rem* to make good a loss sustained by the purchaser in consequence of a defect being discovered in the article sold.<sup>4</sup>

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury, by being detained in custody, pending the suit, the court may, upon the application of either party, in its discretion, order the same, or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury, and the proceeds, or so much thereof as shall be a full security, to be brought into court to abide the event of the suit.<sup>5</sup> And if the claimant of a vessel does not apply for her release to him on appraisement or stipulation,

<sup>1</sup> See *The Steamboat Hendrik Hudson*, U. S. D. C. Northern District of New York, 17 Law Rep. 93; *The Granite State*, 1 Sprague, 277, per *Sprague, J.*; *The Tremont*, 1 W. Rob. 163; *Attorney-General v. Norstedt*, 3 Price, 97; *The Helena*, 4 Rob. Adm. 8.

<sup>2</sup> *The Amelie*, 6 Wallace, 18.

<sup>3</sup> *Boyd v. Urquhart*, 1 Sprague, 423.

<sup>4</sup> *The Monte Allegre*, 9 Wheat. 616.

<sup>5</sup> 10th Admiralty Rule.

the court may in its discretion, on application of either party, upon due cause shown, order a sale of said vessel.<sup>1</sup>

In some of our States there are statutes regulating sales of wrecked ships, and wreck commissioners appointed under them. A sale made under these statutes, and in conformity with their provisions, in good faith, gives a title which is sustained in admiralty.<sup>2</sup> Even if fraudulent, it may give good title as against the owner, to an innocent purchaser, for value, who has neither knowledge nor notice, actual or constructive, of the fraud, nor of any circumstances which would defeat his title.<sup>3</sup> We should not hold that a sale in a proceeding *in rem* under a State statute which authorizes such a proceeding in the case of an ordinary debt, would have the effect of a sale by an admiralty court.<sup>4</sup> But it

<sup>1</sup> 11th Admiralty Rule. See also *The Nathaniel Hooper*, 3 Sumner, 542, 562; *The Nordstjernen*, Swabey, Adm. 260. In *United States v. Sch. Lion*, 1 Sprague, 399, a libel of information was filed against a vessel for forfeiture. The owner did not file a claim. The vessel was sold under an order of court, upon an application made by the district attorney, on the ground that the expenses of holding her in custody were greatly disproportionate to her value, and the marshal had paid the net proceeds into court, having previously deducted one hundred and one dollars for his expenses and fees. The libel against the vessel was afterwards dismissed. Held, that the owner was entitled to the entire proceeds, the sale not being for his benefit.

<sup>2</sup> *The Sch. Tilton*, 5 Mason, 465; *American Ins. Co. v. 356 Bales of Cotton*, 1 Pet. 511. See *The Bonita*, Lush. Adm. 263.

<sup>3</sup> *The Sch. Tilton*, 5 Mason, 465, per *Story*, J.

<sup>4</sup> *The Globe*, U. S. D. C., Northern District of New York, 13 Law Rep. 488. The vessel, in this case, had been sold under an Ohio statute which authorized proceedings against the vessel *in rem*. A suit was then commenced in the United States court to enforce the lien for materials furnished the vessel in the port of a State other than her own, prior to the proceedings in the State court, and the lien was enforced. It also appeared that the State statute had no provision for giving notice to all the world, as in an admiralty proceeding *in rem*, and that in fact no notice was given, though the owner of the vessel appeared and contested the suit. Judge *Conkling* held, on this point, that such a decree, even if it had the force and effect of a decree *in rem*, would not be binding, no notice having been given. This decision was overruled by Mr. Justice *Nelson*, 15 Law Rep. 421, 2 Blatchf. C. C. 427, but the reasons given by Judge *Conkling* seem to us very strong. We have little hesitation in stating the law to be, that a State cannot, by changing the name or nature of the process, bind the rights of persons not parties to the suit. The decision of Mr. Justice *Nelson* is so severely criticised by Judge *Conkling* in the second edition of his treatise on Admiralty Jurisdiction, Vol. I. p. 88 - 102, that we do not deem it necessary to say more about it. We

may well be, if the lien exists only by the law of the State under which the vessel has been already sold, that it cannot be afterwards enforced against the vessel, because in this case the right which the law of the State gave has been taken away by the giver.<sup>1</sup>

As to the power of admiralty to decree a sale of a ship for wreck, unseaworthiness, decay, or any similar cause, on petition of the master and proof of the fact, there seems to be some doubt. The common-law courts of England, who do not deny the efficacy of a judicial sale by admiralty, in cases where suits are brought *in rem*, and who have held such a sale as even prevailing over the right of seizure by the crown for a previous forfeiture,<sup>2</sup> do, nevertheless,

would, however, notice one point taken by *Nelson, J.*, which we consider as opposed to the first principle of a proceeding *in rem*; namely, that notice in some form must be given to all parties interested. The objection is overcome by saying that the owner of the vessel appeared and contested the proceedings throughout. But this is surely a novel doctrine to say that therefore the rights of all parties are concluded. Since the above was written, we have met with the learned opinion of Judge *Treat*, concurred in by Mr. Justice *Catron*, in which the law is stated as follows: "The acts of the various States creating municipal liens, — providing, as many of them do, for their enforcement in suits instituted against the vessels *by name*, instead of against the owners, prescribing, too, the modes of proceeding therein, and of divesting those municipal liens, declaring the rules of priority among domestic creditors, ordering the sale of the vessel and the appearance of the specified lien creditors to urge their demands against the proceeds when brought into the State courts, do not make those proceedings properly suits *in rem*, or give to those courts admiralty powers or jurisdiction. Hence, the judicial sales made under such acts by the order of State courts, divest only the liens *created* by those acts, and the municipal liens embraced within their terms. The purchaser in such cases takes, *cum onere*, as to existing maritime liens, and as to the municipal liens of other States." *Hill v. The Golden Gate* U. S. C. C. Missouri, 6 Am. Law Reg. 273, 302. See also *Riggs v. The Sch. John Richards*, 1 Newb. Adm. 73; *Harris v. The Steamboat Henrietta*, 1 Newb. Adm. 284; *Ashbrook v. The Steamer Golden Gate*, 1 Newb. Adm. 296.

<sup>1</sup> *Ashbrook v. The Steamer Golden Gate*, 1 Newb. Adm. 296. Some of the libellants, in this case, sought to enforce liens under the general maritime law, and others liens under the statute of Missouri. The vessel had already been sold in a suit under that statute in the State court, and the question was as to the effect of the sale. The statute declared that the boat or vessel should, in the hands of the purchaser and his assigns, be free and discharged from all previous liens and claims under the act. The court held that the vessel was not liable after the sale for the claims of those who had a lien only under the statute, but that it was liable to those who had a lien under the general maritime law.

<sup>2</sup> See *Attorney-General v. Norstedt*, 3 Price, 97.

very positively refuse to sanction any such sale for disaster or decay, on petition of the master.<sup>1</sup> But Lord Stowell has declared that the courts of admiralty ought, in his judgment, to possess this power, and to be sustained in this exercise of it; but still held that they did not possess it.<sup>2</sup> It might be expected that the admiralty of this country would assert this power. In one case it was so held; but it was also held that although the court had full power to decree such sale on the application of the master, yet it would not be conclusive against either the owner or third persons.<sup>3</sup> And the courts of admiralty in neither country would hold such decree of sale as conclusive on the subject; or equally conclusive with one which was made necessary by a suit *in rem*.

Closely connected with this subject is that of surveys. A survey is often a document of great value in cases of insurance and loss, and in questions of a sufficient necessity of repair to justify loans on bottomry. And when a sale has been made by a master, or still more perhaps, when a master requests the interposition of a court of admiralty, to decree or justify a sale, then the survey becomes of the highest importance.<sup>4</sup> It is a mercantile measure, with which all masters and merchants are familiar; and the courts of common law as well as of admiralty fully recognize its value.<sup>5</sup> It should be noticed, however, that no report of surveyors is itself evidence at law, unless under peculiar circumstances.<sup>6</sup> And if it were received as evidence in admiralty, as it would be for some purposes, its authority and efficacy would depend upon many cir-

<sup>1</sup> Reid v. Darby, 10 East, 143; Morris v. Robinson, 3 B. & C. 196.

<sup>2</sup> The Fanny & Elmira, Edw. Adm. 117; The Warrior, 2 Dods. 288, 293; The Pitt, 1 Hagg. Adm. 240.

<sup>3</sup> The Sch. Tilton, 5 Mason, 465, 474; Janney v. Columbian Ins. Co., 10 Wheat. 411, 418; Dorr v. Pacific Ins. Co. 7 Wheat. 581; Armroyd v. Union Ins. Co. 2 Binn. 394; Steinmetz v. United States Ins. Co., 2 S. & R. 293; The Dawn, Ware, 485, 487.

<sup>4</sup> The Henry, Blatchf. & H. Adm. 465. See Robinson v. Clifford, 2 Wash. C. C. 1.

<sup>5</sup> The Fortitude, 8 Sumner, 228, 261; Janney v. Columbian Ins. Co., 10 Wheat. 411, 417; The Warrior, 2 Dods. 288; Gordon v. Mass. Ins. Co. 2 Pick. 249; Orrok v. Commonwealth Ins. Co., 21 Pick. 456; Wright v. Barnard, 2 Esp. 700.

<sup>6</sup> See Hall v. Franklin Ins. Co., 9 Pick. 466, 477, and cases cited, 2 Parsons on Ins. 529, n. 1.

cumstances, as upon the character of the report itself, and especially upon the careful observance of all rules and usages which are, as it were, established by the law merchant in relation to the calling of the survey, the appointment of surveyors, the manner of their proceedings and the making up of the report, because these rules are found to be of much use in making the report correct and trustworthy. Thus, the reasons for calling the survey should be plainly set forth; it should be called by one having authority as port warden, if there be any such officer in the port, or by a consul or commercial agent, or in the absence of these, by some one of proper standing and character. The surveyors should be responsible and skilful men, with the knowledge and experience the service requires. They should proceed carefully and examine thoroughly; and in their report detail the steps they take, and give, not their conclusions only, but their reasons for them, and the facts on which these reasons rest.<sup>1</sup>

To return, however, to a judicial sale of a ship by order of admiralty, a difficult and perhaps undetermined question arises, to which we have already given some consideration. It exists when part-owners who hold a moiety in interest petition a court of admiralty to decree a sale of a ship against the will of other and dissentient owners. By an early case in England, it appears that a suit had been instituted in admiralty by part-owners, constituting a minority in interest, praying that the ship might be sold, or that they might have some other remedy, as the court might deem proper; and the other part-owner applied to the King's Bench for a prohibition. Lee, C. J., said: "The admiralty has no jurisdiction to compel a sale, and if they should do that, you might have a prohibition against selling, or compelling the party to sell, or to buy the shares of the others." The reporter adds: "Which was agreed to *per totam curiam*, and the rule as to that was made absolute, but as to compelling a security to be given, the rule was discharged."<sup>2</sup> And so the law seems to be settled in England. But in this country, the current of authority, and, as we think, of reason, is in favor of the admiralty possessing this power, on the ground that it is one of the natural and essential elements of admiralty jurisdiction, which belongs to it by the common consent

<sup>1</sup> See cases *supra*.

<sup>2</sup> *Ouston v. Hebden*, 1 Wils. 101.

of the maritime world, and is expressly incorporated in many maritime codes, and was taken from or denied to admiralty in England by the King's Bench without any sufficient reason or authority. It is true that one of the ablest and most learned judges in admiralty we have ever had, refused to exercise this power, and denied the jurisdiction of the court.<sup>1</sup> In that case the part-owners were equally divided, each of them wishing to employ the ship upon a voyage which the other disliked; and we must confine his remarks to the circumstances of the case. And when that very case was taken by appeal to the circuit court, Mr. Justice Washington, although declaring that when he had first read Judge Hopkinson's decision he was entirely satisfied with it, finally reversed the decree, and ordered the sale, being convinced by the arguments offered and a further investigation, that the court possessed the power and ought to exercise it in such a case as that then before them.<sup>2</sup>

In the District Court of South Carolina, in 1793,<sup>3</sup> and in the District Court of Maine, in 1851,<sup>4</sup> similar decisions have been made. And Mr. Justice Story, in his work on Partnership, examines into the question, and expresses a decided opinion that the American courts of admiralty possess this power, and that it belongs essentially to their jurisdiction.<sup>5</sup> And upon the whole, we cannot doubt that our courts would, generally, at least, adopt similar views.

After a sale is made by order of a court of admiralty, the court will not, except in a very peculiar case, set the sale aside,<sup>6</sup> and it is doubtful whether they would do so in any case.

<sup>1</sup> *Davis v. Brig Seneca*, Gilpin, 10. See also *Willings v. Blight*, 2 Pet. Adm. 288.

<sup>2</sup> *Davis v. Brig Seneca*, 18 Am. Jurist, 486.

<sup>3</sup> *Skrine v. Sloop Hope*, Bee, 2.

<sup>4</sup> *The Vincennes*, decided by Judge Ware, but not reported. We are informed that in this case there were three part-owners, one owning a moiety, and the other two a quarter each. The owner of the moiety was in possession, and was ship's husband, but the parties disagreed as to the voyage, and on application of the two part-owners of the one moiety, the vessel was ordered to be sold.

<sup>5</sup> *Story on Partnership*, § 488.

<sup>6</sup> *Pease v. The Propeller Napoleon*, 1 Newb. Adm. 37.

## CHAPTER XI.

## OF THE EQUITY JURISDICTION AND PRACTICE OF COURTS OF ADMIRALTY.

COURTS of admiralty are not, strictly speaking, courts of equity; thus, if a libellant disclose that his case rests upon a trust, he, in general, destroys his own right of action in admiralty, because the court cannot take cognizance of a bill in equity in the disguise of a libel in admiralty.<sup>1</sup> But they have still very general and extensive powers, analogous to those which belong to courts of equity, and in general govern themselves by similar principles.<sup>2</sup> Thus no party prevails there who does not come into court with clean hands and make out a case *ex æquo et bono*.<sup>3</sup> So a condemnation

<sup>1</sup> *Davis v. Child*, *Daveis*, 71, 80. In *Andrews v. Essex Ins. Co.* 3 *Mason*, 6, it was held that although a court of admiralty had jurisdiction over a contract of insurance, yet it could not reform the policy, that being the province of a court of equity. Mr. Justice *Story* said: "To be sure, in a certain sense, and in the exercise of their general jurisdiction, courts of admiralty may be said to be courts of equity, that is, courts proceeding *ex æquo et bono*, and not confined to the narrow notions of the common law. But courts of admiralty have no general jurisdiction to administer relief as courts of equity. They cannot entertain an original bill or libel for specific performance, or to correct a mistake, or to grant relief against a fraud, though they may perhaps, sometimes, like courts of law, perform what may be deemed analogous functions. They may give the same benefit, as if there were no fraud or mistake, or omission of performance; but this can be in a few cases only, which fall in all their circumstances completely within their general jurisdiction." See also *Bernard v. Hyne*, 6 *Moore*, P. C. 56, 74, per Lord *Langdale*; *The David Pratt*, *Ware*, 495, 500; *Deane v. Bates*, 2 *Woodb. & M.* 87, 92; *Kellum v. Emerson*, 2 *Curtis*, C. C. 79. In this latter case the rule is said to be, that a court of admiralty has not the equitable jurisdiction of a court of chancery, but merely applies principles of equity to subjects within its jurisdiction. And in *Kynoch v. S. C. Ives*, 1 *Newb. Adm.* 205, the court refused to decree the specific performance of a contract for the sale of a ship.

<sup>2</sup> In *Brown v. Lull*, 2 *Sumner*, 443, 449, the court said, concerning mariners' contracts: "Courts of admiralty are not, by their construction and jurisdiction, confined to the mere dry and positive rules of the common law. But they act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity."

<sup>3</sup> In *The Schooner Boston*, 1 *Sumner*, 328, 341, *Story*, J., said: "I take it to

against one party in default or contumacy does not prejudice the rights of any other party to make defence on the same facts.<sup>1</sup> And an agreement made under a clear mistake will be set aside.<sup>2</sup> And after a case has been closed, it may be reopened for sufficient cause; but this the court have said it would be very reluctant to do.<sup>3</sup> In general, a far less rigorous strictness prevails in the construction of maritime contracts in courts of admiralty than in those of common law.<sup>4</sup>

be very clear, according to the course of admiralty proceedings, that no person can come into that court and ask its assistance, unless he can, *ex æquo et bono*, make out a case fit for its interposition. A court of admiralty is, to the extent of its jurisdiction, at least in cases of this sort, a court of equity, and the same rule applies here as in other courts of equity, that the party who asks aid must come with clean hands." This was said in reference to embezzlement by salvors, which, we have seen, forfeits their claim.

<sup>1</sup> The Mary, 9 Cranch, 126.

The Hiram, 1 Wheat. 440.

<sup>2</sup> In *The Fortitudo*, 2 Dods. 58, two suits had been commenced on two bottomry bonds, the first of which was on the ship, and the second on the ship, cargo, and freight. The warrants of arrest were executed in the usual manner, and the average account between the ship, freight, and cargo made out by a third person. The bondholders objected to the amount charged for the freight. The master then consented to take their own account of freight, upon which they withdrew their actions, and supersedeas was decreed. The master then chartered the ship anew, and she was again arrested on the same bonds. The court said: "These are the circumstances stated by the master in his affidavit, and they do not, in my apprehension at least, render it necessary that I should inquire how far the permission again to open a case which has once been closed, comes within the range of that large discretion with which this court is, by its commission, intrusted. It might, perhaps, within the limits of that very extended equity which it is in the habit of exercising, deem it not improper, in some cases, to suffer a cause to be reopened. But it certainly would not do so, unless there existed very strong reasons to show the propriety of the measure. I feel no hesitation in saying, that mere negligence or oversight would not be a sufficient ground for such an extraordinary interposition of the authority of the court. A direct case of fraud, or something equivalent to it, must be made out before I can suffer such a step to be taken." In this case the bondholders were condemned in costs and two months' demurrage.

<sup>4</sup> The cases which show that admiralty courts give a liberal and equitable construction to the contracts which come before them, are innumerable. Most of these cases are cited in this work, under various heads. Among them, we may refer again to the following:—as to the wages of seamen and their contracts, see *The Minerva*, 1 Hagg. Adm. 347; *The Prince Frederick*, 2 Hagg. Adm. 394; *The Cypress*, Blatchf. & H. Adm. 83; *The Triton*, id. 282; *The Crusader*,



Customs and mercantile usages are greatly regarded ; but not those of a particular port or place, for these are seldom allowed to control the general maritime law, unless they are such, and so proved, that they must be taken to be a part of the contract.

Ware, 437 ; *The David Pratt*, Ware, 495 ; *The Betsey & Rhoda*, Daveis, 112 ; *Ellison v. Ship Bellona*, Bee, 106. As to salvage, and agreements extorted in distress, see *The Henry Ewbank*, 1 Sumner, 400, and *The Louisa*, 2 W. Rob. 22, where an agreed apportionment was set aside. As to bottomry bonds, see *The Heart of Oak*, 1 W. Rob. 204, 213. As to the lien of material men, see *Ramsay v. Allegre*, 12 Wheat. 611. And as to the discretion of the court in deciding, by the maritime law, forfeitures of seamen's wages, see *The Crusader*, Ware, 447, and *Cloutman v. Tunison*, 1 Sumner, 373, 379.

## CHAPTER XII.

## OF THE LAW OF ADMIRALTY IN CASES OF TORT AND TRESPASS.

ADMIRALTY jurisdiction in cases of tort depends entirely upon locality. Hence the fact that the vessel is merely engaged in commerce between two ports in the same State does not deprive the court of jurisdiction.<sup>1</sup>

That torts, committed upon the high seas, are within the jurisdiction of admiralty, is certain; and so are those committed on all waters navigable from the sea, and on the lakes and navigable waters connecting the same.<sup>2</sup> Jurisdiction has been sustained in a case where a steamboat ran against a pile which had been negligently left in the bed of a river;<sup>3</sup> but in another case, where buildings on a wharf were destroyed by a fire communicated to them from a vessel which was lying at the wharf, the fire being caused by the negligence of those on board the vessel, the court refused to entertain jurisdiction.<sup>4</sup> The fact that the tort is committed within the body of a county does not oust the admiralty of jurisdiction.<sup>5</sup> If a tortious act originates on land, and is not a

<sup>1</sup> The Commerce, 1 Black, 574.

<sup>2</sup> In *Thomas v. Lane*, 2 Sumner, 1, this jurisdiction in civil cases seems to be confined, by Mr. Justice Story, to acts done on the high seas, or on waters within the ebb and flow of the tide. But under the decisions of our Supreme Court, the rule of tide-waters no longer exists. See also *ante*, p. 165.

<sup>3</sup> *Philadelphia R. v. Philadelphia Steam Towboat Co.* 23 How. 209.

<sup>4</sup> *The Plymouth*, 3 Wallace, 20. *Nelson, J.*, said: "It will be observed that the entire damage complained of by the libellants, as proceeding from the negligence of the master and crew, and for which the owners of the vessel are sought to be charged, occurred not on the water, but on the land. The origin of the wrong was on the water, but the substance and consummation of the injury on land." And in *Ransom v. Mayo*, 3 Blatchf. C. C. 70, where a contract was made on land, between the owner of a vessel and a ship-builder, for the repair by the latter in his ship-yard on the land, it was held that an action *in personam* would not lie, in the admiralty, to recover for damage to the vessel caused by the negligence of the ship-builder in hauling the vessel upon the ways to be repaired.

<sup>5</sup> *Philadelphia R. v. Philadelphia Steam Towboat Co.* 23 How. 209. See also *ante*, p. 163, n. 2.

perfected wrong until the vessel leaves the port, it is a continuous act, and suit may be brought in the admiralty.<sup>1</sup>

The principal cases in which suits in admiralty have been brought for torts are those of collision,<sup>2</sup> those in which passengers have sought for compensation for ill-treatment by the captain, and similar actions by mariners against the officers of the vessel,<sup>3</sup> and those in which actions have been maintained for the abduction or ill-treatment of minors.

It is held that passengers have a legal right, not merely to ship room, and suitable and sufficient food, but to kind and proper treatment, and a due regard to the courtesies and decencies of life; and if these are violated, the offence may be reached and damages recovered by libel in admiralty.<sup>4</sup>

In regard to cases of the third class, it seems to be quite certain that a parent may maintain a libel for the abduction of his minor child, against the master,<sup>5</sup> or the ship-owner; even though the latter has no personal knowledge of the fact, the act of the master being held to be within the scope of his authority, as agent for the owners.<sup>6</sup> But knowledge of the minority on the part of either the master or owner would be essential.<sup>7</sup>

The rule of the common law, that the gist of the action consists in the loss of the services, is followed, and it may be stated as a general rule, that where an action *per quod servitium amisit* would not lie at common law, no suit can be brought in admiralty.<sup>8</sup>

<sup>1</sup> The *Yankee*, 1 McAll. 467.

<sup>2</sup> See Vol. I. p. 525.

<sup>3</sup> See *ante*, p. 89, n. 3. In *Brown v. Overton*, 1 Sprague, 462, a seaman broke his legs while on a voyage. A suit was brought against the master for not putting into St. Helena for surgical assistance, for want of proper care and attention during the passage, and for neglect after arriving at the home port. The action was maintained.

<sup>4</sup> *Chamberlain v. Chandler*, 3 Mason, 242; *West v. Steamer Uncle Sam*, 1 McAll. 505. In *McGuire v. Steamship Golden Gate*, 1 McAll. 104, a suit *in rem* was maintained against the vessel for a personal assault on passengers by the master. The judge, however, doubted whether the suit could properly be brought. See also cases *ante*, Vol. I. p. 609.

<sup>5</sup> *Steele v. Thatcher*, Ware, 91.

<sup>6</sup> *Sherwood v. Hall*, 3 Sumner, 127; *Luscom v. Osgood*, U. S. D. C. Mass., 7 Law Rep. 132; *Walcott v. Wilcutt*, Same Court, 1858; *The Platina*, Same Court, 21 Law Rep. 397. See *ante*, p. 58, n. 1.

<sup>7</sup> *Cutting v. Seabury*, 1 Sprague, 522.

<sup>8</sup> See *Steele v. Thatcher*, Ware, 91; *Plummer v. Webb*, Ware, 75.

In one case, where a minor child was shipped with the consent of his father on a certain voyage, and the libel brought by the father alleged gross and cruel treatment of the child, to the injury of his health, and his subsequent death, jurisdiction was sustained, and the libel determined upon its merits.<sup>1</sup> On an appeal,<sup>2</sup> Story, J., denied the jurisdiction of the circuit court over the case, mainly because the libel sought compensation for positive or permissive violation of an agreement for "good, careful, tender, and parental usage," which, although in connection with services which were to be performed upon the seas, were held to render the contract one of so mixed a nature, that the admiralty could not take cognizance of it. It has, however, always seemed to us that he shrank, in this case, from the possibility of unduly extending the bounds of admiralty jurisdiction, with more than necessary caution.

Actions have also been maintained for the wrongful conversion of a whale upon the high seas.<sup>3</sup> In the whale fishery whales are

<sup>1</sup> *Plummer v. Webb*, Ware, 75.

<sup>2</sup> *Plummer v. Webb*, 4 Mason, 380, 385.

<sup>3</sup> *Taber v. Jenny*, 1 Sprague, 315. In *Bowne v. Ashley*, U. S. D. C. Mass., Sept. 1865, *Lowell*, J., a suit was brought for the conversion of a whale in the Ochotak Sea in July, 1858. It was held that the rule of damages was the value of the whale at the time and place of the conversion; but as there was no market value there, the following rule was laid down: "We must ascertain, then, the value of the oil and bone at some market, and that of New Bedford, adopted by the assessor, and which is the controlling market of this country in this matter, may well be taken as the standard. The sum to be ascertained, then, will be the value at New Bedford, in July, 1858, of the oil and bone made or which might have been made from this whale, less the necessary average expenses of cutting in and boiling, freight, insurance, casks, and other proper charges; and as the transaction is assumed to be a cash transaction on the day of the conversion, less the interest on the supposed outlay for the time of an average direct voyage home, to this result is to be added interest from the day of the conversion. It has been strongly urged that the expenses of cutting in and boiling, and most of the other charges and expenses above enumerated should not be deducted; that the libellant's vessel and men were ready to perform the labor and transport the property; that they took no whale immediately after this time, and came home not wholly full; in short, that they did not request such services to be done, and were not benefited by them. But we must have a general rule, and if we admit the consideration of the actual damage to the plaintiff under the peculiar circumstances of this case, we must open the case to a vast deal of evidence of a very uncertain nature." Judge *Lowell* also said: "The case of *Taber v. Jenny*, 1 Sprague, 315,

often captured and left for a time with some *indicia* of ownership, such as what is called a waif, which is generally a pole or oar with a signal on it, and they are often anchored. In all such cases the right of property remains in the original takers.<sup>1</sup>

Actions for personal torts do not survive the death of the person

appears to adopt a somewhat different rule of damages. But that case was reported by the assessor, and argued by the counsel, upon the basis of the home price of the cargo that actually arrived in the libellant's vessel; and the point raised was, whether the actual charges should be deducted; and I do not believe the court intended to decide any question not fairly before it. I cannot say but that I should fully concur in the result of that case upon the theory upon which it appears to have been argued; nor can I say that there may not have been some reason peculiar to that case for assuming the time for the ascertainment of the damages to be that of the vessel's arrival. To that extent there appears to have been no dispute among the counsel, so that the questions were not presented in their present form. In this case, however, I cannot resist the conclusions to which I have come, though I should hold them with great distrust if I believed they were opposed to a deliberate opinion of Judge Sprague." The rule of damages laid down in *Bowne v. Ashley* was followed in *Bartlett v. Budd*, U. S. D. C. Mass., *Lowell, J.*

<sup>1</sup> *Taber v. Jenny*, 1 Sprague, 315. In *Bartlett v. Budd*, U. S. D. C. Mass., *Lowell, J.*, a whale was captured in the Ochotak Sea in the afternoon. It was anchored in five fathoms of water, and a paddle and sail put on it as a waif. The takers then went on shore. The next day the whale was found by another vessel and cut in and boiled down. A suit was brought for a conversion, a demand having been first made. The defence was that the whale was found adrift, the anchor not holding, and the cable was coiled round the whale, and that there were no irons or waif in the fish. It was held that if this evidence were true the libellants were entitled to recover. The defendants also set up a usage that a whale found adrift in the ocean is the property of the finder, unless the first taker appeared and claimed it before it was cut in. The libellants contended that the usage did not apply to whales found in bays and harbors at all, and only applied to those found off soundings when there were no marks of appropriation except weapons or irons. Judge *Lowell*, without deciding whether the usage applied except in bays and harbors, said: "I find the preponderance of evidence to be very strong in favor of the libellants' version of the usage, in the matter of the definite marks by an anchor or other sure sign of actual capture. And if it were not so, there would be great difficulty in upholding a custom that should take the property of A and give it to B under so very short and uncertain a substitute for the statute of limitations, and one so open to fraud and deceit. I do not, however, here pass upon the limits within which usage may reasonably vary, whether upon the one side or the other, the strict law of the pursuit and capture of animals of this kind, but decide upon the evidence that the whale was the property of the libellants."

injured, even though a right of action is given by a statute of the State in the district in which the court is held.<sup>1</sup>

For the redress of torts, admiralty may proceed *in personam*, and, when the cause of the injury is the subject of a maritime lien, it may also proceed *in rem*; but it has been held that this lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce, and that if a vessel is injured by running against a bridge which crosses a navigable stream, an action *in rem* will not lie against the bridge.<sup>2</sup> And it has also been held that if a bridge is injured by a vessel running against it, a proceeding *in rem* will not lie against the vessel by the owners of the bridge.<sup>3</sup>

<sup>1</sup> *Crapo v. Allen*, 1 Sprague, 184. That actions for the death of another do not survive at common law was assumed in this case, and the only question was whether the statute of the State was applicable. In the subsequent case of *Cutting v. Seabury*, 1 Sprague, 522, a full review of the authorities was made, and *Sprague, J.*, said he could not consider it as settled that no action could be maintained for the death of a human being. The point was not decided.

<sup>2</sup> *The Rock Island Bridge*, 6 Wallace, 213.

*The Bark Savannah*, U. S. D. C. Penn., *Cadwalader, J.*, June, 1868.



# **B O O K I I I .**

**ON THE PRACTICE OF ADMIRALTY.**

**VOL. II.**

**23**





# A TREATISE

ON THE

## LAW OF SHIPPING AND ADMIRALTY.

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### INTRODUCTORY.

THE leading principles and forms of admiralty jurisdiction come down from a very remote antiquity. The commerce of Rome was important, at the time when the civil law was attaining its highest excellence; and the rules and principles adopted for the legal regulation of this commerce were founded upon a clear perception and a wise consideration of the reason and justice of every case. They have survived, therefore, the Roman dominion, and their influence, not to say their authority, extends over continents unknown to Rome; and more in reference to this than any part of her law is the old saying true, that she still governs the world, but now *haud ratione imperii, sed imperio rationis*. The civil law, under that name, prevails on the continent of Europe, particularly in its maritime law; and during the many ages which have elapsed since that law was in force, *proprio vigore*, important modifications have been introduced, as, for example, the rule that freight is the mother of wages, and therefore if that is not earned, they are not, of which rule there is no trace in the Roman civil law.<sup>1</sup> And now when we speak of the civil law in reference to this subject, we must be understood to refer to the European, or modern civil law; and in this way, too, we must interpret our statute of 1789, c. 21, § 2,<sup>2</sup> which provides that "the forms and modes of proceeding in causes of equity, and of admiralty and maritime jurisdiction shall be according to the course of the *civil law*," which provision, three years afterwards, was altered by the statute of 1792, c. 36,

<sup>1</sup> The Dawn, Daveis, 121, 133, per Ware, J.

<sup>2</sup> 1 U. S. Stats. at Large, 93.

§ 2,<sup>1</sup> which requires the same forms and modes of proceeding, etc., to be "according to the principles, rules, and usages which belong to courts of equity, and to courts of admiralty respectively, as contradistinguished from courts of common law; except so far as may have been provided for by the act to establish the judicial courts of the United States, subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper from time to time by rule to prescribe to any circuit or district court concerning the same."

The forms and practice, and indeed the principles of jurisprudence, are very similar in all the courts of admiralty in the world. They are courts of the civil law, of the law of nations, and in England to a certain extent, and in this country still more, although not entirely so in either country,<sup>2</sup> courts of equity. And in this country the forms and whole procedure are simpler, more direct and summary than elsewhere.

In construing the act of 1792, it is to be remembered that sixteen years had elapsed since the independence of the country had been declared, and that, during that time, admiralty jurisdiction had been administered in our courts, and it would follow that if the English mode of practice had been in that time changed by the practice in this country, the latter should prevail.<sup>3</sup>

The power given by the act of 1792 to the Supreme Court of the United States to establish rules, has never been exercised; but under a subsequent act<sup>4</sup> a body of rules has been framed, which,

<sup>1</sup> 1 U. S. Stats. at Large, 276.

<sup>2</sup> See *ante*, p. 344.

<sup>3</sup> *Manro v. Almeida*, 10 Wheat. 473.

<sup>4</sup> Act of 1842, c. 188, 5 U. S. Stats. at Large, 518. As this statute is of great importance in determining how far the rules of the Supreme Court are of binding effect, we cite it here. "The Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate and alter, the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty, and in equity pending in the said courts; and also the forms and modes of taking and obtaining evidence, and of obtaining discovery; and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before

so far as they are authorized by the statute,<sup>1</sup> are of binding effect.<sup>2</sup> These rules we give in the Appendix,<sup>3</sup> and we shall have frequent occasion to refer to them.

By the Forty-Sixth of these Rules the district and circuit courts are to regulate the practice of the said courts respectively, in all cases not provided for by the rules, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

trustees appointed by the court; and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suits therein."

<sup>1</sup> In *The Kentucky*, 4 Blatchf. C. C. 450, *Nelson*, J., speaking of the act of 1842, said: "I think it proper to say, that the general understanding of that act has been, that the court had no power to repeal or modify any regulation of Congress existing on the subjects there referred to."

<sup>2</sup> See *The Steamer St. Lawrence*, 1 Black, 522. In *The Sloop Merchant*, Abbott, Adm. 7, *Betts*, J., said: "Although the question of who may be responsible to a demand is one of general jurisprudence, yet the form and the arrangement of process by which the obligation is to be enforced, is matter of practice. And according to the provisions of the act of Congress of August 23, 1842, the Supreme Court is vested with authority to impose on inferior courts an absolute law in this respect; and the court under that power having proceeded to regulate this subject-matter, their regulation must be regarded as complete and exclusive, inhibiting what it does not allow as well as governing what is fixed by positive appointment." In *Dean v. Bates*, 2 Woodb. & M. 87, 92, *Woodbury*, J., said: "That other objection is the misjoinder of the vessel and the owners in one and the same libel. This involves a proceeding both *in personam* and *in rem*, in the same case, and contravenes the settled rules in admiralty proceedings. See Rules 14 - 17." In *Scott v. The Young America*, 1 Newb. Adm. 107, speaking of the 29th rule, *Wilkins*, J., said: "This rule has the force of a statute, having been established for the government of the court by the act of Congress of August, 1842." In *Ward v. The Ogdensburgh*, 1 Newb. Adm. 139, 156, it was held that since the passage of the 15th rule a suit *in rem* and one *in personam* cannot be joined in a case of collision. In *Gates v. Johnson*, U. S. C. C. Ohio, 21 Law Rep. 279, derelict property picked up by the libellants was deposited with the defendants, who delivered it over to third parties. It was contended that the suit would not lie under the 19th Admiralty Rule. *McLean*, J., said: "The rules in admiralty, prescribing proceedings in certain cases, were not to be regarded as restrictive, but only as enumerative of the more common remedies, leaving such other and further proceedings to be had by the courts as might be found necessary, in any case, to give effect to their jurisdiction."

<sup>3</sup> These rules are published by order of court in 3 Howard's Reports. Additional rules may be found in the 10th, 13th, 17th, and 21st of Howard, and in the 1st of Black.

## CHAPTER I.

## OF PROCTORS.

THE word Proctor signifies much the same as attorney at common law, and is derived from Procurator.<sup>1</sup> In some districts of this country, proctors attend to the whole management of the cause from the beginning. In others, they conduct the case out of court; while the examination of witnesses in court, the arguments, motions, and other incidents of the trial are attended to by the advocate. The proctor being an officer of the court, is held to the utmost good faith.<sup>2</sup> It is his duty to examine a case carefully when it is presented to him, and he ought not, unless the claim is in his apprehension just, or at least doubtful, to bring it before the court, especially in the case of seamen's wages, where generally no available responsibility for costs is incurred by the libellants.<sup>3</sup>

It was formerly the practice in the admiralty for a proctor in bringing a suit to exhibit a proxy, or a power of attorney, authorizing him to commence and prosecute the suit.<sup>4</sup> At the present day this is not customary, but the proctor is presumed to have the authority to appear until such right is disputed. In England there appears to be much looseness of practice on this point; and in one case a suit was commenced on behalf of the master, owners, and crew of a vessel, and on judgment being given for the respondent, the proctor for the libellant stated that he did not know who his parties were, and the court consequently condemned him in the costs of the suit.<sup>5</sup> And in another case the proctor having

<sup>1</sup> In *Jackson v. Steamboat Magnolia*, 20 How. 296, 321, Mr. Justice Daniel, in considering the dangers arising from an extension of the admiralty jurisdiction, speaks of "*some apt fomentor of trouble, metamorphosed and magnified from a country attorney into a proctor.*" The learned judge was perhaps unfortunate in his acquaintance with proctors; but we cannot accept the above as a definition of this important officer of the courts of admiralty.

<sup>2</sup> See *The Earl Grey*, 1 Spinks, 180.

<sup>3</sup> *The Frederick*, 1 Hagg. Adm. 211, 222.

<sup>4</sup> See Clerke's *Praxis*, tit. 5, and additions, where it is said that a proctor is constituted either by proxy or *apud acta curiae*.

<sup>5</sup> *The Whilermine*, 1 W. Rob. 335.

caused the production of irrelevant matter by reason of his unfair representations, was obliged to pay the costs.<sup>1</sup>

A proctor may generally be considered sufficiently *dominus litis*, to make an affidavit of any fact upon which to make a motion, especially if the fact be peculiarly within his knowledge.<sup>2</sup> And if the case goes to trial before an answer is filed by the respondent, the neglect being caused by his absence in good faith, his proctor will generally be allowed to appear as *amicus curiæ*, and make any suggestions, and present any proper evidence to the court.<sup>3</sup>

Proctors, it is said, should always be present when a suit is settled or compromised.<sup>4</sup> But it has been held that a proctor cannot release or compromise a claim without special authority. He is, however, authorized to receive payment, and the amount so paid is a discharge *pro tanto*.<sup>5</sup>

A proctor does not so far stand in the place of his principal that a monition may be served upon him in a different suit from that in which he is retained, although it relates to the same subject-matter.<sup>6</sup>

After a suit is commenced, the respondent has not, as a general rule, the right to settle the case without the knowledge of the proctor of the libellant, and if he does so the settlement may be inquired into by the court.<sup>7</sup> And where a *prochein ami* fraudu-

<sup>1</sup> The Frederick, 1 Hagg. Adm. 211. See also The Sarah Jane, Blatchf. & H. Adm. 401.

<sup>2</sup> The Brig Harriet, Olcott, Adm. 222. A motion was made that the libellant should file additional security for costs. It was opposed on the ground that the affidavit on which the motion was based was made by the proctor, and not by the claimant. The objection was overruled.

<sup>3</sup> The David Pratt, Ware, 495.

<sup>4</sup> The Frederick, 1 Hagg. Adm. 211, 220.

<sup>5</sup> Bates v. Seabury, 1 Sprague, 433.

<sup>6</sup> Nichols v. Tremlett, 1 Sprague, 361.

<sup>7</sup> The Brig Planet, 1 Sprague, 11. The libellant in this case was a boy who shipped at St. John's, N. B., on a certain voyage, but on the vessel's deviating and coming to Boston, demanded his wages and was refused. He then applied to the British consul, who declined to aid him, and then to a proctor of the court. After suit was commenced the master of the vessel sent for the boy, and paid him his wages, but allowed him no costs. The court held that he was clearly entitled to his costs, and the settlement was set aside. See also McDonald v. The Ship Cabot, 1 Newb. Adm. 348; Brooks v. Snell, 1 Sprague, 48; Angell v. Bennett, id. 85; Collins v. Nickerson, id. 126; The Sarah Jane, Blatchf. & H. Adm. 401; The Victory, id. 443.

lently settled a suit without the knowledge of the proctor for the libellant, the court set it aside.<sup>1</sup> Nor, after the decision of the court, has the owner of a vessel a right to pay the wages to the seamen, but the amount should be paid to the proctor, who has a lien on them for his costs.<sup>2</sup>

A distinction has been taken between a suit for wages and one for a tort, and it has been said that as an admiralty court affords no peculiar remedy in actions of tort, a seaman is not under any peculiar protection, nor does he enjoy any special privilege, so that the case stands as to costs as if brought at common law; and that an adjustment by mutual agreement between the parties, of an action of tort, no fraud being shown, bars the proctor from proceeding for his costs.<sup>3</sup> But the correctness of this may perhaps be doubted.<sup>4</sup> A proctor, intending to proceed for costs only, must give notice of his intention to the opposing party.<sup>5</sup> It has been held that a garnishee order of a common-law court cannot be reviewed by a court of admiralty, and that the payment, under a garnishee order, of costs pronounced due to a successful party by decree of the court, is satisfaction of the decree, even against the proctor of the party who claims his lien.<sup>6</sup> If, however, the money is in the registry of the court, the proctor's lien will be first satisfied.<sup>7</sup>

<sup>1</sup> *The Etna*, Ware, 462.

<sup>2</sup> *The Araminta*, Swabey, Adm. 81.

<sup>3</sup> *Peterson v. Watson*, Blatchf. & H. Adm. 487.

<sup>4</sup> See *Angell v. Bennett*, 1 Sprague, 85. In *Purcell v. Lincoln*, 1 Sprague, 230, a suit was brought against the mate of a vessel for a tort. After service of the process, the parties made a settlement, and the libellant gave to the respondent a written discharge of both damage and costs. At the time of the settlement the respondent was confined to his house by sickness, and the libellant represented to him that he had fully paid his proctor. The respondent had not seen or consulted counsel, and there was no evidence that he had received any notice of the claim, or of the intention to institute a suit before the service of process. On all these facts the libel was dismissed without costs. Stress appears to have been laid on the fact that the proctor should have given notice before bringing the suit, as it appeared that the respondent being sick could not escape, and that the settlement was not collusive, and as in an action of tort the damages are indeterminate, it did not appear that the settlement was not a fair one. See also *Brooks v. Snell*, 1 Sprague, 48.

<sup>5</sup> *The Sarah Jane*, Blatchf. & H. Adm. 401.

<sup>6</sup> *The Olive*, Swabey, Adm. 423.

<sup>7</sup> *The Jeff Davis*, Law Rep. 2 Adm. 1.

## CHAPTER II.

## OF A SUIT IN ADMIRALTY.

## SECTION I.

## OF THE TIME WHEN A SUIT MAY BE BROUGHT.

IN respect to the time in which a suit may be brought, but little need be said. It has been decided that neither the Statute of Anne,<sup>1</sup> limiting suits in the English admiralty, nor the statute of limitations of any of our States,<sup>2</sup> is of any force in our admiralty courts. Although it is said that courts of admiralty govern themselves in the maintenance of suits by the analogies of the common-law limitations, and are not inclined to depart from them unless under very strong circumstances;<sup>3</sup> at the same time, there is an universal maxim, "*vigilantibus non dormientibus subveniunt leges*," and admiralty will not enforce stale demands.<sup>4</sup> And even the most favored lien, that of a seaman for his wages, may be lost by a delay to enforce it.<sup>5</sup> Whether a claim is to be considered stale or not must depend upon the peculiar circumstances of each particular case, and it is difficult to lay down any general rule. It is, however, we think, evident that a party may have a suit *in personam* when he cannot sue *in rem*; because, in this latter case, the rights of a *bond fide* purchaser may intervene. But even where the suit is *in personam*, the defendants may be prejudiced by the delay; and in one case where a suit was brought by one co-owner against the others for supplies furnished the vessel more

<sup>1</sup> Willard v. Dorr, 3 Mason, 91, 161.

<sup>2</sup> Brown v. Jones, 2 Gallis. 477.

<sup>3</sup> The Brig Sarah Ann, 2 Sumner, 206, 212. See also The Platina, U. S. D. C. Mass., 1858, 21 Law Rep. 397, 399, per Sprague, J.; Hall v. Hudson, 2 Sprague, 65.

<sup>4</sup> The Anne, 5 Rob. Adm. 100. The Brig Sarah Ann, 2 Sumner, 206, 212.

<sup>5</sup> See cases in notes, *infra*.



than six years before, and the owners had paid their proportion to the agent of the vessel, the suit was dismissed, although within the six years a bill in equity was brought for an account in a State court, which bill had been discontinued.<sup>1</sup> If the vessel remains in the hands of the owners who were in possession at the time the debt accrued, an action may be brought after a considerable lapse of time.<sup>2</sup> But if the vessel has been sold to a *bond fide* purchaser, the suit should be brought as soon as an opportunity is presented; and if it is not, a delay is fatal.<sup>3</sup> A colorable sale is, of course, of

<sup>1</sup> Hall v. Hudson, 2 Sprague, 65.

<sup>2</sup> Piehl v. Balchen, Olcott, Adm. 24. In the case of The Sloop Canton, 1 Sprague, 437, a delay of two years was held not to prevent the enforcement of the lien, where the ownership of the vessel remained unchanged, although, as it would seem from the report of the case, the seamen had the opportunity to libel the vessel at any time within the two years. In The Eastern Star, Ware, 185, the vessel was sold before the wages were earned, and made but one voyage afterwards before she was libelled. It was held that the lien was not lost. See cases *ante*, Vol. I. p. 164, n. 2; p. 531, n. 3; and The Brig Sarah Ann, 2 Sumner, 206.

<sup>3</sup> In Packard v. Sloop Louisa, 2 Woodb. & M., 48, 55, a delay of three years, the vessel having been sold, was held to be fatal. If the seamen are present when the sale takes place, and make no objection to it, and do not inform the purchaser of their claims, their lien is gone. Trump v. Ship Thomas, Bee, 86; Joeline v. Scow Bolivar, Olcott, Adm. 474. In the case of The Admiral, U. S. D. C. Mass., 18 Law Rep. 91, a steamer which plied regularly between St. John, N. B., and Boston, was libelled for a collision which had taken place twenty months before. There were agents of the damaged vessel in Boston during that time. The vessel in the mean time had been sold to an incorporated company, some of the members of which were the former owners of the vessel. It was held that this fact did not constitute notice to the corporation, and that it was no defence that this suit had been delayed to await the result of another suit pending between the libellants and the former owners of the Admiral. The libel was therefore dismissed. See also The Lillie Mills, 1 Sprague, 307; Leland v. The Medora, 2 Woodb. & M. 92, 99; The Utility, Blatchf. & H. Adm. 218; The General Jackson, 1 Sprague, 554; Stillman v. The Buckeye State, 1 Newb. Adm. 111. In The Ship Mary, 1 Paine, C. C. 180, the seamen were shipped on a voyage from New York to New Orleans, and back to New York. The voyage was broken up at New Orleans, and the seamen were discharged there. The vessel was sold in October, and remained at the same port till the following May, when her owner sent her on a voyage to Liverpool and thence to New York, where she was at once libelled by the seamen. It was held that, there being no laches on the part of the seamen, the lien was not lost. In another suit against the Scow Bolivar, mentioned above, it appeared that the libellant was not present at the sale, that the purchaser took the vessel at once out of the State, and that

no effect.<sup>1</sup> Where a libel against the cargo of a vessel was filed to recover the balance due under a charter-party, before the cargo had been discharged from the vessel, it was held that a previous agreement by the claimant that such a libel should be commenced, and his assisting the officer in arresting the goods, and afterwards obtaining them, by giving satisfaction without objection, was a waiver of any right which he might have to object to the time of instituting the suit as premature.<sup>2</sup>

When the respondent intends to rely on the objection of the staleness of the claim, or any other defence that does not go to the merits, it should be propounded by a formal plea or by a distinct allegation in the answer.<sup>3</sup> And it has been held that the burden of proof to make out such laches as would operate to forfeit the lien is on the claimant.<sup>4</sup>

the libellant left his demand with his proctor with directions to have the vessel arrested as soon as she returned to the State. This being done, the lien was held to continue. *Shook v. Scow Bolivar*, Olcott, Adm. 480. See also *Sheppard v. Taylor*, 5 Pet. 675; *Reeder v. Steamship George's Creek*, U. S. D. C. Maryland, 3 Am. Law Reg., 282; *Cole v. The Atlantic*, Crabbe, 440; *The Sch. Marion*, 1 Story, 68, 72; *The Barque Chusan*, 2 id. 455; *Anderson v. The Sloop Solon*, Crabbe, 17; *Freeman v. Sch. Jane*, id. 178. In *The Eliza Jane*, 1 Sprague, 152, the vessel was owned in St. John, New Brunswick, the supplies were furnished in Boston, some in January, and the residue in September of the same year. The vessel left Boston after the supplies were furnished in January, but was there in July. The vessel was sold to a *bonâ fide* purchaser in October. Held, that the claim for the supplies furnished in January was lost by the delay to enforce it, but that the claim for supplies furnished in September could be enforced.

<sup>1</sup> *The Paul Boggs*, 1 Sprague, 369.

<sup>2</sup> *The Salem's Cargo*, 1 Sprague, 389. In this case *Sprague, J.*, also said: "If there had been no waiver, it would have been in the power of the court, by giving costs or otherwise, to give to the claimant a complete indemnity for all the loss and inconvenience he can sustain by the premature commencement of the suit. And it would not have been necessary to dismiss the libel, which, as the goods have now gone beyond the reach of process, would defeat the remedy against them. It is not the practice of courts of admiralty to favor formal or technical objections, to the sacrifice of substantial justice."

<sup>3</sup> *The Platina*, U. S. D. C., Mass., 1858, 21 Law Rep. 397.

<sup>4</sup> *The Prospect*, 3 Blatchf. C. C. 526.

## SECTION II.

## OF A SUIT FOR SEAMEN'S WAGES.

In suits for seamen's wages, there are some peculiarities of practice which should be noticed. The seamen are by statute<sup>1</sup> entitled to receive from the master of the vessel to which they belong, one third part of the wages which shall be due at every port where such vessel shall unlade and deliver her cargo before the voyage is ended, unless the contrary be expressly stipulated in the contract; and, as soon as the voyage is ended and the cargo or ballast fully discharged at the last port of delivery, the seamen are entitled to their wages, and if the wages are not paid within ten days thereafter, or if any dispute shall arise between the master and seamen touching the wages,<sup>2</sup> the judge of the district

<sup>1</sup> Act of 1790, c. 29, § 6, 1 U. S. Stat. at Large, 133. We give this statute in the Appendix.

<sup>2</sup> It is said by Mr. *Dunlap*, in his work on Admiralty Practice, p. 100, that this clause relative to a dispute, is not construed by the district court of Massachusetts as authorizing, in case of a dispute, a suit in admiralty before the expiration of the ten days, the clause being regarded as either a dead letter, which cannot be carried into effect without violating the spirit of the law, or as merely providing for a dispute respecting the wages, as well as for a neglect of payment, after the expiration of the ten days. If this be the correct construction of the statute, it exposes the seamen to great hardships, for it is usual for the crew, as soon as they are discharged and paid off, which is generally done as soon as they are discharged, to scatter in different directions, so that it is frequently impossible for the seamen with whom the master has had a controversy to procure any evidence whatever of the matters about which the controversy exists. To consider the clause a dead letter is opposed to every principle of construction, and to construe it as giving the right to have the preliminary hearing, in case of a dispute, after the expiration of the ten days, seems to us absurd. To hold that it gives the right of action after the expiration of the ten days does not help the matter, for the right would exist without the clause, and we must either hold that it has no effect whatever, or else that it means that, in case of a dispute concerning the amount of wages, the right to a preliminary hearing accrues at once. This latter view seems to be adopted by the court of common pleas in Massachusetts, *Chaffin's Case*, Essex, Sept. T. 1825, *Dunlap's Adm. Practice*, 101, and in the Southern District of New York. See a *dictum* to this effect by *Beets, J.*, in *The Schooner Eagle*, Olcott, Adm. 232, 237. It was held, in this case, that where the only defensive allegation was that the wages were not due because the contract was not fulfilled at the time of action brought, the contestation of the point did not fall within the provision, which was

where the vessel is, or if his residence be more than three miles from the place where the vessel is, then any judge or justice of the peace may summon the master to appear and show cause why process should not issue against the vessel.<sup>1</sup> And if the master neglects to appear, or appearing, does not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute is not forthwith settled, the judge shall certify to the clerk of the district that there is sufficient cause to issue admiralty process, and it shall thereupon issue. And, by a subsequent act, the same power which by virtue of this act is conferred upon any judge or justice of the peace is given to a United States commissioner.<sup>2</sup>

Immediate admiralty process is permitted in case of a dispute,<sup>3</sup> if the vessel has left the final port of delivery before payment of the wages, or is about to go to sea before the expiration of the ten

said to relate "to the proceedings of the seaman after his contract is performed and his right to wages has become perfected." See also *Betts' Adm. Practice*, 62. The same construction is now given to the statute in the Massachusetts district. *The Ship Wm. Jarvis*, 1 Sprague, 485. But a mere declaration by the owner that he would not pay until after the ten days does not amount to a dispute. *The Commerce*, 1 Sprague, 34.

<sup>1</sup> In *Kief v. The Steamboat London*, 1 Newb. Adm. 6, it was held that the certificate of the justice of the peace or commissioner under the subsequent statute, must state the residence of the judge of the district, and that it was more than three miles from the place, or that the judge was absent from his place of residence.

<sup>2</sup> Act of 1842, c. 188, 5 U. S. Stat. at Large, 516. In *The Sch. Eagle*, Olcott, Adm. 232, the commissioner under this act granted a certificate of probable cause for process of attachment against the vessel, and the case came before the district court on appeal. *Betts, J.*, said: "The competency of the court to entertain an appeal from proceedings before a commissioner has not been made a question by either party. It is exceedingly doubtful at best whether the court has any jurisdiction of that kind; but an order to stay proceedings may be made, or the subject may be deemed originally before me; and as all the proofs have been presented and acted upon by both parties, without exception to the appeal, I am disposed to consider and determine the case the same as if the petition had been presented here in the first instance." It seems, where original shipping articles are proved before a commissioner, and redelivered to the vessel, which thereupon pursues its voyage, that a certified copy of the articles is competent evidence upon the hearing in court. *Henry v. Curry*, Abbott, Adm. 433.

<sup>3</sup> In *The Ship Wm. Jarvis*, 1 Sprague, 485, it was held that in case of a dispute the seaman might have immediate admiralty process against the vessel, and that a previous summons to the master was not necessary.

days.<sup>1</sup> But unless the case falls within one of the exceptions pointed out, the right of action does not accrue until ten days after the actual discharge, or after the discharge of cargo might have been and should have been made.<sup>2</sup>

It has been said that fifteen days would be a proper allowance of time.<sup>3</sup> At all events, the owner would not be permitted to defeat the seamen's claims or suits *in rem*, by a wilful and unnecessary delay in the discharge of cargo. And the act of 1790 reserves whatever rights the seamen have of proceeding at common law, for their wages. It has been doubted whether the statute did not permit the ten days to run from the end of the voyage, intending them to be the days of discharge;<sup>4</sup> but we think that this construction cannot be maintained. If the seamen be discharged by the owner or master, then, undoubtedly, the ten days begin to run

<sup>1</sup> The *Cypress*, Blatchf. & H. Adm. 83. In *The Trial*, Blatchf. & H. Adm. 94, it was held that the seamen are not bound to prove positively that the vessel is about to proceed to sea, but all that is required of them is to show a reasonable ground of belief that the vessel is about to proceed to sea, and this "may be gathered from concomitant circumstances, as well as direct proofs." In both of these cases, the process was by suit in admiralty, and not in the mode pointed out by the statute. It is said, however, in the northern district of New York, to be the custom to require the summons and certificate where the vessel is about to proceed to sea, but it is doubted whether there is any necessity for this, when the vessel has actually gone to sea. 2 Conkling's Adm. 2d ed. 52.

<sup>2</sup> In *Hastings v. Ship Happy Return*, 1 Pet. Adm. 253, Judge *Peters* doubted whether seamen were obliged to remain and unload the vessel, on account of the general custom which prevails in this country to have this work performed by stevedores. And in *The Mary, Ware*, 454, it is said that the usage of the port must determine whether such an obligation exists. But in *The Sch. Eagle*, Olcott, Adm. 232, 235, *Betts, J.*, said: "Without the aid of an express stipulation, a seaman cannot, accordingly, sue for wages earned on a foreign voyage, until the full completion of the voyage, by the unlading of the cargo or ballast as aforesaid."

<sup>3</sup> In *Holmes v. Bradshaw*, U. S. D. C. Mass., 1822, cited in *Abbott on Shipping*, 635, note, Judge *Davis* is reported to have held that if the crew are retained to unlade the vessel, fifteen working days might be considered a proper time for the discharge of the cargo, by analogy to the Collection Act of 1799, and that the ten days then began to run. In *Edwards v. Ship Susan*, 1 Pet. Adm. 165, fifteen days were also allowed; and in *Thompson v. Ship Philadelphia*, 1 Pet. Adm. 210, it appearing that more than fifteen days were necessary, a longer time was allowed, there having been no unnecessary delay. See also *The Martha*, Blatchf. & H. Adm. 151; *Granon v. Hartshorne*, Blatchf. & H. Adm. 454.

<sup>4</sup> See *Edwards v. The Ship Susan*, 1 Pet. Adm. 165.

from the time of the discharge.<sup>1</sup> Nor does the statute prohibit the filing of a libel before the ten days have expired, but only the issuing of process.<sup>2</sup> And it has been held that if the seamen are discharged, the right of action commences at once.<sup>3</sup>

The provisions of the statute apply only to proceedings *in rem*, and not to suits *in personam*, and a seaman may therefore bring an action against the master or owners, as soon as the period of his service is completed.<sup>4</sup>

<sup>1</sup> The *Mary*, Ware, 454; *Holmes v. Bradshaw*, U. S. D. C. Mass., 1822, cited in *Abbott on Shipping*, 635, note, cited in *Dunlap's Adm. Practice*, p. 100, as decided December Term, 1823. It was held in this latter case that the day of discharge was not to be included in the ten days. The most reasonable construction, we think, is put upon these words: "as soon as the voyage is ended, and the cargo or ballast be fully discharged," in the case of *The Mary*, *supra*. It was shown that the contract of the seamen might expire as soon as the vessel was moored in safety, or when the cargo was discharged, and the right of the seamen to their wages depended on which of these times was to be taken, the ten days running from one or the other, according to the contract. The libellant must, however, prove the fact of the discharge. In the case of *The Sch. Eagle*, *Olcott*, Adm. 232, 236, the libellant contended that he had done this, — first, by his own affidavit; secondly, by implication or presumption, inasmuch as the crew were not required to unload the cargo, it being done by stevedores, and third, that the master had not denied on oath the allegations sworn to by the libellant. The court held that although the affidavit might be sufficient "to authorize supporting proofs in the first instance, or to furnish ground for an order against parties omitting to appear or show cause," yet it was not evidence in a suit in court, especially when contradicted by disinterested witnesses; and it was held that the other grounds taken were not sufficient to prove a discharge.

<sup>2</sup> The *Mary*, Ware, 454; *Francis v. Bassett*, 1 Sprague, 16. See *The Martha*, *Blatchf. & H. Adm.* 151. In *Granon v. Hartshorne*, *Blatchf. & H. Adm.* 454, it was held that where an action is brought prematurely, but becomes perfected before the stipulations and answer of the respondent are filed, and the answer when filed admits a right of action in the libellant, the court need not dismiss the libel, but will impose costs on the libellant if the suit is vindictive or unreasonably prosecuted.

<sup>3</sup> The *Cabot*, *Olcott*, Adm. 150; *The Cadmus*, *Blatchf. & H. Adm.* 147; *The David Faust*, 1 *Bened. Adm.* 187. See also *The Cypress*, *Blatchf. & H. Adm.* 83.

<sup>4</sup> *Freeman v. Baker*, *Blatchf. & H. Adm.* 372. The rule is stated to be otherwise in the district court of Massachusetts by Mr. *Dunlap*, in his work on *Admiralty Practice*, p. 100; but the doctrine of the text was sustained by that court in February, 1846, in the case of *Collins v. Nickerson*, 1 Sprague, 126. See also *The Commerce*, 1 Sprague, 34, 36; *Chaffin's Case*, Court of Common Pleas, Essex County, Massachusetts, September Term, 1825, *Dunlap's Adm. Practice*, 101.

Although a subject-matter of defence is not set up in the preliminary hearing before the commissioner or magistrate, it may be taken advantage of, when the case comes before the court on its merits.<sup>1</sup>

We shall see, that all seamen having the like cause of complaint against the same ship are required to be joined as complainants.<sup>2</sup> And if several libels are brought by them against the vessel, the court would direct them to be consolidated. In some districts the practice is for some of the seamen to commence an action by the preliminary hearing above mentioned, and when process issues against the ship, for the other seamen to intervene under the Thirty-Fourth Admiralty Rule. Before this rule was passed, they came in on petition, and, the vessel being under arrest, they had the benefit of the attachment without the preliminary examination.

It is usual to annex to the libel, in a suit for wages, an account stating the time of service, the rate and amount of wages, with a credit for the amount advanced during the voyage. But this account is no part of the libel, nor is it necessary that any such account should be annexed to it. It is sufficient if the libellant states the contract, and avers the service with proper certainty, and that there is a balance of wages remaining due. It is not absolutely necessary to aver that any precise balance is due.<sup>3</sup>

### SECTION III.

#### OF THE MANNER OF BEGINNING THE SUIT.

In the manner of beginning a civil suit in admiralty, a change has taken place somewhat similar to that by which at common law the original writ was superseded, and the action began in practice at what was once rather a late step in the *mesne* process. In England, a suit begins in admiralty with a citation of the respondent or defendant, who enters his appearance in court, and gives security, and thereupon the plaintiff offers his libel. With us the libel is the beginning, the earliest proceeding in a suit.

<sup>1</sup> The Warrington, Blatchf. & H. Adm. 335, 341.

<sup>2</sup> See *post*, p. 372, n. 1.

<sup>3</sup> Pratt v. Thomas, Ware, 427, 431.

Ordinarily, the libel and all succeeding papers are filed in the clerk's office,<sup>1</sup> but the act of Congress relating to forfeiture, makes it perhaps necessary that a libel of information should be filed in court.<sup>2</sup>

But, before we attempt to describe this instrument or process, we would premise two remarks. One, that as there is no exact and regular system of pleading in admiralty, acknowledged by all our courts as authoritative, except so far as the same is regulated by the rules of the Supreme Court, the courts of different districts differ somewhat in their forms. Each court has generally, perhaps always, its own system of rules, which are known to its bar, and however binding upon its members, are not recognized as of positive authority in other districts. The second is, that all our courts of admiralty agree in regarding substance as of more importance than form, in the proceedings which come before it, and, therefore, any process in admiralty is, in general if not always, sufficient, which distinctly brings the substance of a case and the actual parties before a proper court, in such a way as to permit the questions of the case to be investigated, its merits ascertained, and justice done.<sup>3</sup> It is not probable, therefore, that any difference in the rules of practice could lead, often if ever, to more important consequences, than that he who differs from one code of forms by his observance of another, may meet with some delay, and incur the necessity of amendment.

<sup>1</sup> The 1st Admiralty Rule prescribes that no mesne process shall issue from the district court in any cause of admiralty or maritime jurisdiction, until the libel or libel of information shall be filed in the clerk's office.

<sup>2</sup> Mr. Dunlap, in his treatise on Admiralty Practice, p. 130, is of the opinion that, in an admiralty case in behalf of the United States, to enforce a forfeiture, it would be hazardous to adopt any other course, because the Act of 1799, ch. 22, § 89, 1 U. S. Stats. at Large, 695, declares that it shall be "libelled and prosecuted" in the "proper court having cognizance thereof." But we should not infer from this that it was absolutely essential that the libel should be filed in open court.

<sup>3</sup> See *Jenks v. Lewis, Ware*, 51.



## SECTION IV.

## OF THE PARTIES TO A LIBEL.

The libel (from *libellus*, a little book) is, or contains, the statement upon which the libellant, or plaintiff, founds his case. It should properly be brought by the party actually entitled to the relief or aid which the libel prays for,<sup>1</sup> and not in the name of one person for the benefit of another. It has, however, been held that the agent of absent owners may sue, either in his own name as agent, or in the name of his principals, and that a subsequent power of attorney is a sufficient ratification of what he had done in their behalf.<sup>2</sup>

Where a suit for collision was brought in the name of A and the damage pronounced for, and on referring the case to assess damages, it appeared that B, and not A, was the registered owner of the vessel injured, Dr. Lushington held that the case should proceed, and if there was any doubt as to the party entitled to receive the amount, he should order it to be paid into the registry, and throw upon the party claiming it the burden of establishing his ownership.<sup>3</sup>

A consignee may also sue in admiralty in his own name for damage done to the goods consigned to him, or for their non-delivery.<sup>4</sup> And an assignee of a chose in action may sue in his own name,<sup>5</sup> even though the assignment is but of a part of the entire right.<sup>6</sup> So, bailees of a vessel may sue for damage done to the vessel, which is in their possession under a contract obliging them to return the vessel in as good order as when received by them.<sup>7</sup>

<sup>1</sup> *Cobb v. Howard*, 3 Blatchf. C. C. 524; *Mutual Safety Ins. Co. v. The Cargo of The Brig George, Olcott*, Adm. 89; *The Sch. Mary Ann Guest*, id. 498. See *Fretz v. Bull*, 12 How. 466.

<sup>2</sup> *Houseman v. Sch. North Carolina*, 15 Pet. 40, 49; *McKinlay v. Morrish*, 21 How. 343.

<sup>3</sup> *The Ilos, Swabey*, Adm. 100. In this case the party in whose name the suit was brought claimed to be the beneficial owner by a bill of sale not registered. See also *The Minna*, Law Rep. 2 Adm. 97.

<sup>4</sup> *McKinlay v. Morrish*, 21 How. 343; *Lawrence v. Minturn*, 17 How. 100.

<sup>5</sup> See *ante*, Vol. I. p. 193, n. 2.

<sup>6</sup> *Swett v. Black*, 1 Sprague, 574.

<sup>7</sup> *The Minna*, Law Rep. 2 Adm. 97.

In cases of seizure, the libel should be in the name of the United States, and the collector should not be joined as libellant.<sup>1</sup> And in case of a capture, the prize proceedings should be in the name of the United States, and not in the name of the captor.<sup>2</sup> Minors sometimes sue in admiralty without the intervention of a *prochein ami*, or guardian, and sometimes by one. There seems to be no rule on this point.<sup>3</sup>

In some instances, as in some cases of salvage, the libellant<sup>4</sup> sues for himself and for others, and then the libel should state facts to show that, and in what manner, these others are entitled, and who they are, as definitely as may be. If there are many libellants, the case of each should be distinctly articulated, as otherwise, if there be a general decree, and appeals by some of the parties only, there may be needless embarrassment and expense.<sup>4</sup>

If a plaintiff or defendant die, and the cause of action survive, his executor or administrator may appear, and will be treated as the actual party;<sup>5</sup> but not if it do not survive.<sup>6</sup>

<sup>1</sup> United States v. Three Parcels of Embroidery, U. S. D. C. Mass., Ware, J., 19 Law Rep. 140.

<sup>2</sup> Jecker v. Montgomery, 18 How. 110, 124. The suit in this case was in the name of the commander of the capturing vessel. No exception was taken to this mode of proceeding till the case came before the Supreme Court, and it also appeared that the libel was authorized by the government. It was held that although the form of action was irregular, yet that it was too late to take advantage of it.

<sup>3</sup> See Dunlap's Adm. Practice, 88. A minor may recover in his own name wages earned in sea service, when the contract on which he sues was made personally with him, and it does not appear that he has any parent, guardian or master entitled to receive his earnings. Wicks v. Ellis, Abbott, Adm. 444; The David Faust, 1 Bened. Adm. 184. In Gifford v. Kollock, U. S. D. C. Mass., Ware, J., 19 Law Rep. 21, it was held that where a minor shipped for a whaling voyage under the direction of his father, who furnished his outfit of clothing, the libel was rightly brought in the father's name.

<sup>4</sup> See Sheppard v. Taylor, 5 Pet. 675, 714.

<sup>5</sup> The 31st section of the Act of Sept. 24, 1789, 1 U. S. Stats. at Large, 90, provides "that where any suit shall be depending in any court of the United States, and either of the parties shall die before final judgment, the executor or administrator of such deceased party who was plaintiff, petitioner, or defendant, in case the cause of action doth by law survive, shall have full power to prosecute or defend any such suit or action until final judgment," etc. We presume that

<sup>6</sup> Crapo v. Allen, 1 Sprague, 184.

## SECTION V.

## OF JOINDER OF PARTIES.

The act of 1790, relating to seamen, provides that if their wages are not paid, etc., a suit may be brought, "and in such suit all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants."<sup>1</sup> Although in other cases parties are not obliged to join in one libel, "yet it is a practice deserving commendation and encouragement in all cases where it can be adopted without complicating too much the proceedings, and thereby prejudicing the rights of the parties."<sup>2</sup> And where several libels by different persons are brought where only one is necessary, the court may order them to be joined, and impose costs upon the libellants.<sup>3</sup> Where the

this statute was intended to apply to suits in admiralty as well as to actions at law or in equity. This subject is not mentioned directly in the Admiralty Rules of the Supreme Court, but Mr. Justice *Curtis* supposes that it is covered by the 34th Rule, which provides for the intervention of a third party. The *Brig Ann C. Pratt*, 1 *Curtis*, C. C. 340, 343. But this rule appears to be limited by its terms to the case of a third person intervening for his own interest, and we should not suppose it was meant to apply to the case of a person suing in a representative character.

<sup>1</sup> Act of 1790, c. 29, § 6, 1 U. S. Stats. at Large, 134. See *Oliver v. Alexander*, 6 Pet. 143. In *The Sloop Merchant*, Abbott, Adm. 1, it was held that a claim for wages and for moneys advanced to the use of a vessel on the part of one libellant, could not be joined in an action *in personam* with a separate claim for wages alone, on the part of another, but could be *in rem*.

<sup>2</sup> *Rich v. Lambert*, 12 How. 347, 353; *Fretz v. Bull*, 12 How. 466. The following citation is from the manuscript case of *The Young Mechanic*, decided by *Ware, J.*, U. S. D. C. Maine, 1855. "It may be stated as a general rule in the admiralty, that where several persons have claims *in rem* against a single thing, whether arising from tort, or contract of a like nature, and all involving one question, all may unite in a single libel for the purpose of having that question tried, although when that is settled there may be special defences applicable to each case. When the general question is decided, the case of each libellant becomes separate and independent, and is litigated on its own merits. But though they may, they are not compelled to unite, and if separate libels are brought, this will have no influence in the hearing on the merits of the case, but will affect only the question of costs, unless satisfactory cause is shown for separate libels."

<sup>3</sup> *The Ship Henry Ewbank*, 1 Sumner, 400; *Rich v. Lambert*, 12 How. 347, 352. *The Charles Henry*, 1 Bened. Adm. 8. In *The William Hutt*, Lush. Adm.

cause of action is a joint contract, all the parties to it must join;<sup>1</sup> and in the same way the defendants to a joint contract must be sued jointly.

Where a contract is made by a material man, and the work executed by him, he may sue on the contract in his own name, although he has a partner, if there is no evidence that the partner had in any way an interest in the profits of the contract; and it is said that if he had such an interest, he need not be joined.<sup>2</sup>

In a case of tort, where the injury is joint, here, as before, all injured must join. It is said that all persons interested in a cause of collision may be joined in the libel. Thus the owners of the vessel, and the shippers of the cargo, and all other persons affected by the injury, may join, or it may be prosecuted by the master as the agent of all concerned.<sup>3</sup> And it would seem that in a cause of collision a carrier might recover the value of the cargo as well as that of his vessel.<sup>4</sup> But the defendants, when jointly and severally liable, may be sued severally, and if the trespasses are separate and distinct, several suits should be brought; and if they are joined, the libel should be dismissed for multifariousness, and a misjoinder of parties.<sup>5</sup>

Where the non-joinder of a party as libellant happens for good reason, or, indeed, for any reason not fraudulent or otherwise

25, several actions were brought against a ship by different plaintiffs in respect of one action of collision. A bail bond was given in each action, and the different cases were then consolidated by order of court. A decree was then made for the libellants, which on appeal was affirmed, and the case remitted with directions "to proceed according to the tenor of former acts had and done." A motion was then made to dis sever the three actions. Dr. *Lushington* held that the court had the power to order actions to be consolidated, and to dis sever them, if need be, for good cause shown; that no cause was shown in this case, and that, under the mandate of the higher court, he had no power to dis sever the actions if cause had been shown.

<sup>1</sup> In *Taber v. Jenny*, 1 Sprague, 315, it was held that where two vessels are under a contract of mate-ship, there is no such joint property in a whale taken by one of them as requires the owners of both to join in an action for its tortious conversion.

<sup>2</sup> *The Ship Potomac*, 2 Black, 581, 584.

<sup>3</sup> *The Commander In Chief*, 1 Wallace, 43, 51.

<sup>4</sup> See *The Propeller Commerce*, 1 Black, 574. *The Commander In Chief*, 1 Wallace, 43.

<sup>5</sup> *Thomas v. Lane*, 2 Sumner, 1, 9.

wrongful, it is not permitted to affect the omitted party, and he may sue afterwards. And parties may be added or struck out by a supplemental libel at any period, if the court think proper. The master and owners of a vessel cannot be sued jointly for wages.<sup>1</sup> The action must be against the ship, freight, and master, or against the ship and freight, or against the owner or master alone *in personam*.<sup>2</sup>

A part-owner may sustain a petitory suit against a merely fraudulent possessor, without joining the other part-owners, and if they do not appear or object, and the libellant establishes his title, the court will decree the possession of the vessel to him.<sup>3</sup>

Where it appears that the parties named as libellants are competent to prosecute the suit, the non-joinder of others having an interest in the controversy must be shown by exception in the district court, and cannot be made available as an original objection when the case has gone up on appeal.<sup>4</sup>

## SECTION VI.

### OF JOINDER OF ACTIONS *EX CONTRACTU* AND *EX DELICTU*.

The general rule is often stated by text-writers, that actions *ex delicto* may be joined with those *ex contractu* in the same libel. This may be true to a certain extent, and the reason given for it is, that no regard is paid to the names or forms of actions, and that it is never made a point of pleading whether the case rests upon contract or tort. The evidence may also be of the same nature in both cases, and thus great expense and delay is saved.<sup>5</sup> The matter is not provided for by the rules of the Supreme Court, except that it is there enjoined that all libels shall state the nature of the cause; as, for example, that it is a cause civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be. This rule makes one of the reasons above given of no effect, and further adjudication is necessary to

<sup>1</sup> *Matern v. Gibbs*, 1 Sprague, 158.

<sup>2</sup> 13th Adm. Rule.

<sup>3</sup> *The Friendship*, 2 Curtis, C. C. 426.

<sup>4</sup> *The Commander In Chief*, 1 Wallace, 43, 52.

<sup>5</sup> *Borden v. Hiern, Blatchf. & H.* Adm. 293, 297.

determine the question. And the decisions prior to this rule have not been uniform. Where additional wages are given by statute in the case of the discharge of a seaman in a foreign country, it is well settled that these may be recovered in a suit for wages, although they are to a certain extent in the nature of damages.<sup>1</sup> Mr. Dunlap, in his work on Admiralty Practice,<sup>2</sup> says: "An action in admiralty has been sustained in the district court of the United States for the district of Massachusetts, by a mate against a master of a ship for wrongfully dismissing and degrading him from his station, and an article or count for wages was joined in the libel.<sup>3</sup> It is also allowed, but not required, in that court, to join in distinct articles causes of action *ex contractu* and *ex delicto* in the same libel."<sup>4</sup> In 1832, Judge Betts held that a claim against a master and mate for an assault, and a claim against the master for wages earned in the same voyage, might be joined in the same libel.<sup>5</sup> But in 1837, Judge Ware held that an action of damages, as for assault and battery, against the master, could not be joined in the same libel with an action for wages, if it were excepted to.<sup>6</sup> And Judge Sprague has held that a claim for personal damages cannot be included in the same libel with a claim for the fine recoverable under the statute of 1840, c. 48.<sup>7</sup>

<sup>1</sup> *Emerson v. Howland*, 1 Mason, 45; *Orne v. Townsend*, 4 Mason, 541.

<sup>2</sup> Page 89.

<sup>3</sup> *Paty's Case*.

<sup>4</sup> *Ryan's Case*, Sept. Term, 1831.

<sup>5</sup> *Borden v. Hiern, Blatchf. & H.* Adm. 293.

<sup>6</sup> *Pratt v. Thomas, Ware*, 427. This case was decided on the ground that a claim of damages for a personal wrong is an entirely independent claim, and perfectly unconnected with that for wages. Much stress was also laid upon the point that the master was liable for wages only in his quality as master, and if he had paid them he had his remedy against the owners; whereas the damages recovered against him for a personal wrong were his own proper debt. See also *The Jack Park*, 4 Rob. Adm. 308. In *Steamboat Orleans v. Phœbus*, 11 Pet. 175, 182, Mr. Justice Story said: "It may be here proper to state that it is very irregular and against the known principles of courts of admiralty to allow in a libel *in rem*, and, *quasi*, for possession, the introduction of any other matters of an entirely different character, such as an account of the vessel's earnings, or the claim of the part-owner for his wages and advances as master."

<sup>7</sup> *Knowlton v. Boes*, 1 Sprague, 163. The statute referred to provides that if the master of any vessel shall refuse to allow the seamen to see the consul in any foreign port, "he shall be liable to each and every individual injured thereby, in damages, and shall in addition thereto be liable to pay a fine of one hundred dol-

## SECTION VII.

## OF JOINDER OF ACTIONS IN REM AND IN PERSONAM.

Prior to the adoption of the Admiralty Rules of the Supreme Court in 1845, the question was often discussed as to the propriety of the joinder of actions *in personam* and actions *in rem* in the same libel.<sup>1</sup> It is unnecessary to consider these cases at length, as the subject-matter is provided for by the Rules referred to. These are in brief as follows: In pilotage and collision<sup>2</sup> cases the libellant may proceed against the ship and master,<sup>3</sup> or against the ship, or against the owner alone, or the master alone *in personam*. In suits for mariners' wages, the ship, freight, and master, or the ship and freight, or the owner or master alone *in personam*, are liable.<sup>4</sup> In case of assaults the suit is *in personam* only.<sup>5</sup> In suits against the ship or freight founded upon a mere maritime hypothecation, either express or implied, by the master for moneys taken up in a foreign port for supplies or repairs or other necessities, without any claim of marine interest, the suit may be *in rem*, or against the master or owner alone *in personam*. In bottomry

lars for each and every offence, to be recovered by any person suing therefor in any court of the United States in the district where such delinquent may reside or be found." 5 U. S. Stats. at Large, 397. Judge *Sprague* doubted whether there was jurisdiction in admiralty to enforce it, and held that if there was, the libellant could not unite in one libel a claim for personal damages with a claim for a fine which he sues for in a different capacity, that of a common informer.

<sup>1</sup> See *Waring v. Clark*, 5 How. 441; *Arthur v. Sch. Cassius*, 2 Story, 81, 99; *The Anne*, 1 Mason, 508, 512; *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, 16.

<sup>2</sup> *Ward v. The Ogdensburgh*, 1 Newb. Adm. 139, 156. A suit *in rem* does not lie against the cargo on board the ship doing the injury, although it belongs to the owners of the vessel. *The Victor*, Lush. Adm. 72.

<sup>3</sup> *Newell v. Norton*, 3 Wallace, 257.

<sup>4</sup> *The Sloop Merchant*, Abbott, Adm. 7.

<sup>5</sup> The 16th Admiralty Rule prescribes that in all suits for an assault or beating on the high seas or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only. See also *The Yankee*, 1 McAll. 467. The question has arisen, whether passengers who have been beaten by the master can sue the ship *in rem* for a breach of the contract, and recover damages for the assault. Such a suit has been maintained in *McGuire v. The Golden Gate*, 1 McAll. 104, though the judge expressed great doubt whether it was properly brought.

bonds the suit is *in rem* against the property hypothecated or its proceeds in whosoever hands it may be found, "unless the master has without authority given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has by his own misconduct or wrong lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrongdoer." In salvage the suit is *in rem* against the property saved or its proceeds, or against the party at whose request and for whose benefit the salvage service has been performed.<sup>1</sup> And a suit may be commenced against the salvors by the owners of the property saved, for an adjustment.<sup>2</sup>

In petitory or possessory suits, the process is by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit. Material men may proceed, in the case of supplies, repairs, or other necessities furnished to a foreign

<sup>1</sup> See the 19th Admiralty Rule of the Supreme Court of the United States, and *Miller v. Kelly*, Abbott, Adm. 564. In *Bondies v. Sherwood*, 22 How. 214, where an action for salvage was brought *in rem* and also *in personam*, Mr. Justice Grier, after noticing that the two forms were joined, said: "By reference to Mr. Conkling's treatise, p. 42, it will be found that it is the prevailing opinion that both cannot be joined in the same libel. The point has not been brought before this court, and we notice it now only to show that it is not now decided. In *The Hope*, 3 Rob. Adm. 215, an objection to a monition calling on the owner to show cause why salvage was not due, was overruled. See also *The Meg Merrilies*, 3 Hagg. Adm. 346; *The Rapid*, id. 419; *The Centurion*, Ware, 477. We should suppose that under the term "property saved" might be included the freight of the vessel, because this is as much saved by the salvage service as is the ship or cargo; and in England the action is frequently entered against the ship and freight. *The Peace*, Swabey, Adm. 85. The 38th Admiralty Rule provides that in case of salvage and other suits *in rem*, where the freight or other proceeds of property are attached, the court may, upon petition, order the party charged with the possession, to appear and show cause why he should not bring the same into court. In *Gates v. Johnson*, U. S. C. C. Ohio, 21 Law Rep. 279, property found derelict on Lake Erie was brought to Cleveland and deposited with the defendant for safe-keeping. The libel was filed by the salvors, alleging that the defendant had, in violation of their rights, delivered over the property to other parties, and had received a certain sum of money and a bond of indemnity therefor. The sum of money was paid over to the owners of the salving vessel, who were joined as respondents. It was contended that the action would not lie under the 19th Rule, but the court held that the Admiralty Rules were not to be regarded as restrictive, but as enumerative of the more common remedies. But see the cases cited p. 378, n. 1.

<sup>2</sup> *Post v. Jones*, 19 How. 150.



ship, or to a ship in a foreign port, against the ship and freight *in rem* or against the master or the owner alone *in personam*. In the case of a domestic ship, their right of action for supplies, repairs, or other necessities, is limited by a late rule to an action *in personam*.

These Rules being promulgated in accordance with an act of Congress, have all the effect of law, and no suit will lie against an owner *in personam* jointly with a suit *in rem* against the vessel.<sup>1</sup> If such a suit is brought, the district court may allow an amendment which strikes out the name of the owner.<sup>2</sup>

It will be noticed that the rule as to material men provides that the suit shall be against the ship *and* freight. But we do not know of any decision which prevents the party from bringing his action against the ship alone, and in many cases of repairs, there is no freight pending against which to bring the action.

The Rules above referred to make no provisions in respect to contracts of affreightment. To determine whether a joinder of actions is allowed in this case, reference must be had to the practice of the courts of the several districts. In New York, an action *in rem* and *in personam* against the master has been sustained.<sup>3</sup> We doubt, however, whether such a proceeding would be allowed in Massachusetts.<sup>4</sup>

<sup>1</sup> *Dean v. Bates*, 2 Woodb. & M. 87, 92; *Ward v. The Ogdensburgh*, 1 Newb. Adm. 139; *The Sloop Merchant*, Abbott, Adm. 1. But see *Gates v. Johnson*, 21 Law Rep. 279, cited p. 377, n. 1.

<sup>2</sup> *Newell v. Norton*, 3 Wallace, 257.

<sup>3</sup> *The Zenobia*, Abbott, Adm. 48.

<sup>4</sup> See *Citizens' Bank v. Nantucket Steamboat Co.* 2 Story, 16, 57. The action in this case was *in personam* merely, but the language used by Mr. Justice Story fully justifies the doubt of the text. In *Arthur v. Sch. Cassius*, 2 Story, 81, 99, the libel was on a charter-party, *in personam* against the master, and *in rem* against the vessel. The master died pending the proceedings, and Mr. Justice Story held that the libel must be treated as defunct as to the master, and that it was unnecessary, therefore, to consider whether an action *in rem* and *in personam* could be joined.

## SECTION VIII.

## OF THE ESSENTIAL ELEMENTS OF A LIBEL.

The libel informs the court who the libellant is, and what he claims, and what the facts are which support his claim, and of the persons or things against which the claim is made. We see at once what are the essential elements of a libel. They are seven in number, and each of them should be distinctly set forth, in appropriate language.

I. The name and legal description of the judge, and of the court before which the suit is brought.

II. The name and legal description of the libellant, and any office, function, or relation the libellant may hold, if the right to sustain the action depends upon it, as if he be a foreigner claiming on any particular ground as an heir, or executor, or guardian, in which capacity he might sue at home; or if the libellant be a married woman with separate personal rights.

III. The name and legal description of the person or thing against whom or which the suit is brought.

IV. The nature of the cause, as that it is a cause civil and maritime, of contract, or of tort or damage, or of salvage,<sup>1</sup> or of possession, or otherwise as the case may be, and if the libel is *in rem*, that the property is within the district, and if *in personam*, the names and occupations and places of residence of the parties.<sup>2</sup>

V. The facts upon which the suit is brought.

VI. That the premises are true, and within the admiralty and maritime jurisdiction of the United States and of the court.

VII. The prayer for the process, which is suited to the case.

VIII. The prayer for the relief or remedy which the libellant seeks by the suit, and which the court is competent to give.

The process prayed for may be a warrant of arrest of the person of the defendant, in the nature of a *capias*; or a warrant of arrest

<sup>1</sup> In *The Island City*, 1 Clifford, C. C. 210, the libellant alleged his claim to be "in a cause of contract civil and maritime, and for extra services rendered." The allegations in the other articles of the libel showed that a salvage service had been performed, and it was held that the libellant could recover as for a salvage service.

<sup>2</sup> 23d Admiralty Rule.

with a clause therein, if the defendant cannot be found, to attach his goods and chattels to the amount sued for; or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or a simple monition in the nature of a summons to appear and answer to the suit. This is the mesne process provided by the Second Admiralty Rule. The relief prayed for may be, that the defendant may be decreed to pay the debt or damage claimed; or that the property be sold for forfeiture, or to pay the demand in the libel, or be decreed to belong to the libellant, and to be delivered to him.

How these things should be stated we can better indicate by the forms we give in the Appendix, than in any other way; saying now only that the demand of the libellant should be so clearly stated that the respondent may know, without any doubt, what claims he must repel. The facts should be stated, also, that they may be understood by all interested in knowing them, and the judge be able to see judicially that they bring the case within his jurisdiction, and within the law of his court.<sup>1</sup>

It is necessary, however, to say something more of that part of the libel which corresponds to the declaration at common law. It resembles this, so far as it is a statement of the facts which compose the case of the plaintiff, but in other respects it differs. Thus, there are no forms of statement by libel which are definitely appropriated to different actions; and there are no precise rules or precedents which must be followed under peril of certain defeat. The narrative of the libel should be plain, perspicuous, full, giving all the facts which can by any reasonable construction be considered as a part of the case, and expressing all things in clear and accurate language.<sup>2</sup> In a case where a canal boat in tow of one

<sup>1</sup> Thus, in *Thomas v. Lane*, 2 Sumner, 1, 10, it is said that "the court cannot judicially know that the tide ebbs and flows in the harbor of Havana." The libel should state the facts sufficiently to show that the court has jurisdiction of the case. *Boon v. The Hornet*, Crabbe, 426.

<sup>2</sup> The 23d Admiralty Rule prescribes that "the libel shall also propound and articulate in distinct articles the various allegations of facts upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article." In *Pettingill v. Dinsmore*, Daveis, 208, it was held that in a libel for damage, each separate and distinct tort which is relied on, and for which damages are claimed, should be set forth in a distinct allegation.

steamboat, was injured by a collision with another steamboat, it was claimed that the libellant was not bound, in a suit against the two vessels, to set forth anything more than that his boat was in tow of one of the steamboats, and was injured by a collision occurring between her and the other steamboat, but the court held that the circumstances, as seen by the persons on board the canal boat, should be set forth.<sup>1</sup>

In a collision case between a sailing vessel and a steamer, it has been held not to be necessary for the former to set forth in the libel whether she kept her course or not.<sup>2</sup>

In some of the books the "counts" of a libel are spoken of. Thus Mr. Dunlap says: "It is a common practice to make each count in a libel a distinct article, and to set forth the first allegation in each count as an *imprimis* averment, and the subsequent allegations in each count as distinct items." But this use of the term might mislead a common-law practitioner. By "counts" is not meant the separate articles in a libel, because it is of the essence of each count in a declaration at common law that it should be good by itself, and that it should be enough to give the plaintiff his case, if all the other counts failed or were stricken out. It is rather of the essence of each article in a libel in a civil case, that it should *not* be thus good and valid of itself; for it should be a component and important part of the whole, not telling the whole story of itself, and yet such that if it were stricken out the whole would be maimed and imperfect. But there are sometimes counts in a libel in admiralty as well as in a declaration at common law, and they are inserted for the same purpose, and to the same end, namely, that if one count fails the other may stand good. Thus, where goods are delivered to the master of a vessel, and are destroyed before they are put on board the vessel, and the master gives a bill of lading for them after they are thus destroyed, it would seem to be proper that the libellant should declare in one count, which should consist of several articles, upon the bill of lading; and in another count, which should also consist of several articles, he should declare upon the contract of affreightment, independently of the bill of lading. Because if he declared merely on the bill of lading, the answer would be, "The master had no

<sup>1</sup> The Steamboat Transport, 1 Bened. Adm. 86.

<sup>2</sup> The West of England, Law Rep. 1 Adm. 308.

authority to sign the bill till the goods were on board." And if he declared on the contract of affreightment, the answer would be that there was a special contract, and the action should have been brought on the bill of lading, which was the evidence of the contract.

The word "counts" in the Twenty-fourth Admiralty Rule was probably inserted to meet cases of this kind.

The plaintiff at common law *declares*; the libellant in admiralty *propounds* and *articulates*. It is common in this country for the libellant to say only that he "showeth" to the court so and so. The more accurate method is to say that he "propounds and articulates," or, as in some forms, that he "alleges and articulately propounds." What is meant by *articulating* is, the dividing of the statement into its articles, or separate elements, each of which constitutes an article by itself. There can be no uniform and positive rule as to the manner of doing this. The purpose, however, is obvious enough, and will be a sufficient guide. It is that each independent fact, or closely connected sequence of facts, should be stated by itself, in such a way that each one may be distinctly denied or admitted by the answer, and the proof applicable to each one may be separated, and considered by itself; and as the articles are parts of one continuous narrative, they should follow each other in their proper and natural order. How this may be done in different cases will be indicated by the forms we give. But it is obvious that no two practitioners would be likely to do this in the same way, and no two cases would permit precisely the same division and arrangement. It is said that a libel may be "simple" or "articulate." And if there is but one fact in the plaintiff's case, or a few facts indissolubly connected, it may be unobjectionable to omit a division into articles. Generally, however, a division will be found useful; and, indeed, the Twenty-second Admiralty Rule requires statements which, we think, should always be articulated.

It has been remarked that "the properties of a libel are these, namely, that it be round, dilucid, concluding, not obscure, uncertain, nor general, or alternative."<sup>1</sup> So far as we understand these epithets, they are applicable, excepting that we have some doubts about the last. We know no good reason, nor sufficient authority, for saying that the stating part of a libel shall never be, or contain,

<sup>1</sup> Law's Forms of Eccl. Law, 148.

an alternative.<sup>1</sup> The libellant must state his case as well as he can, and as precisely and specifically as possible, but if it should happen that a material fact—something, for example, relating to the condition of the ship in a case of salvage—may have been caused in either of two ways, the libellant knows not which, but the defendants do, we know not why he must either omit the fact, or elect one way to state it, taking his chance of its being the right one; or say that it happened in both ways, which would probably be impossible. We should hold, therefore, that he might state the fact precisely as it is in his knowledge; that is, in the alternative.

In many cases of libel *in personam*, the damages are liquidated, or capable of being made precise by evidence; in others, as for personal torts, not; but in either case, and in the last especially, damages should be laid in a definite sum, on account of the law regulating appeals. The amount claimed should not be unreasonably large, nor is the court bound by it, when it is smaller than the justice of the case clearly requires.<sup>2</sup>

Regularly, the libel should be signed by the libellant, or his agent, and by a proctor of the court, and, unless brought in behalf of government, verified by the oath of the libellant. This matter, however, is of course very dependent upon the practice and rules of the several district courts of this country.<sup>3</sup> By an oath is meant

<sup>1</sup> In *The Emily & Caroline*, 9 Wheat. 381, it was held, in an information under the Slave-Trade Act of 1794, that a charge stated in the alternative was good, if each alternative constituted an offence for which the thing was forfeited.

<sup>2</sup> *Pratt v. Thomas*, Ware, 427; *The Jonge Bastiaan*, 5 Rob. Adm. 322.

<sup>3</sup> In *Coffin v. Jenkins*, 3 Story, 108, 121, Mr. Justice Story said: "I observe, too, that there are some irregularities in the present case. The libel is sworn to, but not the answer. The reverse is the usual and proper practice, although there is no objection to the libel being sworn to, if the libellant chooses." This is left to some extent an open question by the Admiralty Rules of the Supreme Court. The seventh rule provides merely that "In suits *in personam* no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court upon affidavit or other proper proof showing the propriety thereof." In the Massachusetts district no rule has been passed on this subject since the rules of the Supreme Court went into operation, but the practice appears to be that the libel is not required to be sworn to unless there is an arrest of person or property. See *Dunlap's Adm.* 126. The rule appears to be the same in both of the New York districts. In Maine, the practice is to require, if not the libel, yet in all cases the debt or cause of action upon which the libel is filed, to be verified by affidavit. See *Hutson v. Jordan*, Ware, 385.

a verification of the cause of action, and not the ancient oath of calumny of the admiralty.<sup>1</sup>

The libellant may require the respondent to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel, at the close or conclusion thereof.<sup>2</sup>

The practice is general in this country, and perhaps universal, to file the libel in the clerk's office, at any time, either of term or vacation, and taking out the proper process thereafter, at once; and until the libel is filed in the clerk's office no process can issue.<sup>3</sup>

But, before speaking of process, it should be remarked that admiralty deems it proper that a request for payment or settle-

<sup>1</sup> *Pratt v. Thomas, Ware*, 427. In this case an affidavit stating that the facts set forth in the libel were to the best of the belief of the party taking the oath, was held to be sufficient.

<sup>2</sup> 23d Admiralty Rule. In *Gammell v. Skinner*, 2 Gallis. 45, *Story, J.*, said: "In suits for mariners' wages, the libellant may compel the adverse party to answer special interrogatories, which are filed under the direction of the court, and are like the interrogating part of a bill in chancery." Whether the interrogatories were filed with the libel, or afterwards, does not appear. Mr. *Dunlap*, in his work on Admiralty Practice, 125 (1836), says: "Interrogatories are sometimes annexed to the libel, and sometimes propounded at some subsequent stage of the cause." And Mr. *Benedict*, *Adm. Pr.* 477, says: "Either party may, at any time before hearing, propose interrogatories to the other, and he is not compelled to annex them to his pleading, or to put them in at the same time that he files his pleading, although that is the usual course." The 99th Rule of the court for the southern district of New York provides that either party may propound interrogatories to the other, within four days from the putting in of the claim or answer or other pleading, and the perfections of the same, if excepted to. So, too, the rule in force in the first circuit at the time Mr. *Dunlap* wrote, gave the libellant the right to require the personal answer of the defendant on oath to interrogatories filed in court. On reference to the new 23d Rule now in force, it will be found that it states what the libel *shall* contain, and at the close give the libellant the power stated in the text. We should have considerable doubt whether this rule, and the omission of the mention of the subject in any other, should be construed as confining the libellant to the exercise of his right to interrogate the defendant by questions at the close of the libel. In suits *in rem* there is no defendant at all, strictly speaking, and interrogatories filed with the libel to all persons who may claim the property would be of little avail, until it is known who those persons shall be. We should have no doubt but that the court would allow a libellant, after the answer of the claimant was filed, to amend his libel by adding interrogatories to the claimant, or the party answering.

<sup>3</sup> 1st Admiralty Rule.

ment should be made before an action is brought; and though the court would not probably defeat an action on this ground, unless in extraordinary cases, it would deem it a good reason for throwing the whole expense on the libellant, if there were any reason for supposing that the request might have prevented the litigation.<sup>1</sup>

Where the libel is filed by the government for a breach of the revenue laws, or other offence which is followed by forfeiture, and triable in admiralty, it is called sometimes a libel of information, but more properly, perhaps, an information, which it is in fact. It differs from the libel in civil cases, in that it begins with stating that the attorney of the United States "gives this honorable court (or the judge aforesaid) to understand and be informed that, &c.," and then sets forth the place of seizure, whether it be on land, or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States, and mentions the district within which the property is brought, and where it then is. It should also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require. It should conclude with a prayer of due process to enforce the forfeiture and to give notice to all persons concerned in interest to appear and show cause at the return day of the process why the forfeiture should not be decreed.<sup>2</sup> And as this is in the nature of a criminal proceeding, and therefore all the steps must be critically accurate, the district attorney sometimes states the fact in many ways, under so many counts of the information, when he is not certain as to the exact facts which will appear in proof. It is not necessary to state any fact which is only matter of defence,<sup>3</sup> but the facts relied on as grounds of forfeiture should be distinctly and severally articulated, with a general averment that the same are contrary to the

<sup>1</sup> See *Purcell v. Lincoln*, 1 Sprague, 230.

<sup>2</sup> 22d Admiralty Rule.

<sup>3</sup> *The Aurora*, 7 Cranch, 382. If the exception is in the positive enactments of the statute, it should be negatived, but exceptions which come in by way of proviso, or in subsequent statutes, are properly matters of defence for the defendant. *United States v. Hayward*, 2 Gallis. 485, 497.



form of the statute or statutes of the United States.<sup>1</sup> In other respects the libel of information, the claim and stipulations, and delivery of property, are like those in libels in civil suits, excepting that the district attorney is never required to stipulate for costs, and such other diversities of practice as arise from any special provisions as to forfeitures or from the rules of the courts. On the questions which may arise, the rules of the common law have no force, excepting so far as they are rules also of justice and reason.<sup>2</sup> But it may be prudent, as it is on the whole the safest practice, to follow these rules to some extent, in framing the averments and allegations of the libel; and a libel of information should carefully follow the statute on which it is founded.<sup>3</sup> It is generally sufficient if the offence is described in the words of the law, and so described that if the allegation is true, the case must be within the statute.<sup>4</sup> But if the words of the statute are general, embracing a whole class of individual subjects, but must necessarily be so construed as to embrace only a subdivision of that class, the allegation must conform to the legislative sense and meaning.<sup>5</sup> The offence must also be substantially stated, and it is not enough to refer to the provisions of a particular statute.<sup>6</sup> And a charge may be stated in the alternative, if each alternative constitutes an offence for which the thing is forfeited.<sup>7</sup>

The process in admiralty, which follows the libel, is intended, as at common law, to call the defendants into court to answer the plaintiff, or to arrest and hold them personally, or to attach their property and make it responsible for the debt. There is, however, one very important difference between admiralty and common

<sup>1</sup> In *The Merino*, 9 Wheat. 391, it was held not to be necessary to conclude *contra formam statuti*; but this is now rendered necessary by the 22d Admiralty Rule. Much technical nicety is said to exist in common-law informations relative to a conclusion in the singular or plural, and the rules may be found in Dunlap's Admiralty Practice, p. 118, 119.

<sup>2</sup> The same technical strictness is not required in admiralty as in proceedings at common law. *Cross v. United States*, 1 Gallis. 26, 31; *Sch. Hoppet v. United States*, 7 Cranch, 389; *The Samuel*, 1 Wheat. 9.

<sup>3</sup> *The Sch. Betsey*, 1 Mason, 354.

<sup>4</sup> *The Samuel*, 1 Wheat. 9; *The Emily*, 9 Wheat. 381; *The Merino*, 9 Wheat. 391.

<sup>5</sup> *The Mary Ann*, 8 Wheat. 380.

<sup>6</sup> *The Sch. Hoppet v. United States*, 7 Cranch, 389.

<sup>7</sup> *The Emily*, 9 Wheat. 381.

law; it is that admiralty has a proceeding *in rem*, in civil, though not in criminal cases, which is unknown at common law. This undoubtedly arose from the frequent necessity of action in courts of maritime jurisdiction in reference to property, as ships or cargoes, when the owners were either unknown or were out of the reach of the court. Whatever be its origin, we have no doubt that it extends to all property or the proceeds of property upon which a maritime claim may be made by the law of admiralty or by a local law, but that the right to proceed *in personam* exists concurrently with the other, and either may be used at the election of the libellant.

## CHAPTER III.

## OF MESNE PROCESS IN SUITS IN PERSONAM.

## SECTION I.

## OF THE PROCESS OF ARREST OF THE PERSON OF THE DEFENDANT.

THE Second Admiralty Rule, which went into force in 1845, provided that in suits *in personam*, the mesne process might be by a simple warrant of arrest of the person of the defendant, in the nature of a *capias*.

It was provided by statute in 1839,<sup>1</sup> that no person should be imprisoned for debt in any State, on process issuing out of a court of the United States, where, by the laws of such State, imprisonment for debt had been abolished; and where, by the laws of a State, imprisonment for debt should be allowed, under certain conditions and restrictions, the same conditions and restrictions should be applicable to the process issuing out of the courts of the United States; and the same proceedings should be had therein, as were adopted in the courts of such State. And it was afterwards declared, in 1841,<sup>2</sup> that this act should be so construed as to abolish imprisonment for debt, on process issuing out of any court of the United States, in all cases whatever, where, by the laws of the State in which the said court shall be held, imprisonment for debt has been, or shall hereafter be abolished.

In 1850, the Supreme Court passed a rule<sup>3</sup> providing that "imprisonment for debt on process issuing out of the admiralty court is abolished in all cases where, by the laws of the State in which the court is held, imprisonment for debt has been or shall be here-

<sup>1</sup> Act of 1839, c. 35, 5 U. S. Stats. at Large, 321. The act has been held not to apply to a debtor of the United States. *United States v. Hewes, Crabbe*, 307.

<sup>2</sup> Act of 1841, c. 2, 5 U. S. Stats. at Large, 410.

<sup>3</sup> 10 How. v.

after abolished upon similar or analogous process issuing from a State court."

It will be noticed, that while the act of 1839 provides not only for the case of imprisonment for debt being abolished by the State laws then in force, but also for the case of imprisonment being allowed in certain cases, the act of 1841 adopts not only the existing State laws, but also future laws; it applies, however, only to those laws which abolish imprisonment. It has, therefore, been held that the statute of 1841, and the Supreme Court rule of 1850, apply only to cases where, by the State laws, imprisonment for debt is absolutely abolished, and not where it is merely modified and restricted.<sup>1</sup>

In 1867,<sup>2</sup> an act was passed which provided: "That whenever upon mesne process or execution issuing out of any of the courts of the United States, any defendant therein is arrested or imprisoned, he shall be entitled to discharge from such arrest or imprisonment, in the same manner as if he was so arrested or imprisoned on like process of the State courts in the same district. And the same oath may be taken, and the same length of notice thereof shall be required, as is provided by such State laws; and all modifications, *conditions* and *restrictions* upon imprisonment for

<sup>1</sup> *In re Freeman*, 2 Curtis, C. C. 491. This was a hearing upon a rule against the marshal calling on him to show cause why he had not levied an execution on the body of a debtor. The execution was issued on a decree in admiralty. The marshal set up in defence the United States statutes of 1839, 5 U. S. Stats. at Large, 321, and of 1841, 5 U. S. Stats. at Large, 410, and the act of Massachusetts of 1855, entitled "An Act to abolish imprisonment for debt, and to punish fraudulent debtors." Mr. Justice Curtis doubted whether the adoption by Congress of prospective legislation by the States was constitutional, but held that Congress had adapted merely laws abolishing imprisonment and not laws modifying it, and that the law of Massachusetts fell within this latter class. So held, also, in *Campbell v. Hadley*, 1 Sprague, 470, in respect to the Massachusetts act of 1857. A writ of *habeas corpus* was issued in such a case in the circuit court for the Northern District of New York, and the debtor released. The case was taken to the Supreme Court, but this point was not considered. *Pratt v. Fitzhugh*, 1 Black, 271. The case of *Hodge v. Bemis*, U. S. D. C. Northern District of New York, 12 Law Rep. 470, and the cases of *Gardner v. Isaacson*, Abbott, Adm. 141, and *Gaines v. Travis*, Abbott, Adm. 422, to the same effect, were decided before the additional rule was passed. In *The Kentucky*, 4 Blatchf. C. C. 448, where the party was released, the State law was passed in 1831.

<sup>2</sup> Act of 1867, c. 180, 14 U. S. Stats. at Large, 543.

debt, now existing by the laws of any State, shall be applicable to process issuing out of the courts of the United States therein, and the same course of proceedings shall be adopted as now are or may be in the courts of such States. But all such proceedings shall be had before some one of the commissioners appointed by the United States circuit court to take bail and affidavits."

If the sum exceeds five hundred dollars, no warrant of arrest of either person or property can issue unless by the special order of the court upon affidavit, or other proper proof showing the propriety thereof.<sup>1</sup>

## SECTION II.

### OF MESNE PROCESS BY ATTACHMENT OF GOODS.

The next form of *mesne process* allowed by the second admiralty rule, is "a warrant of arrest of the person of the defendant, with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for."

This form of process applies only to the case where the party cannot be found. It has, therefore, been deemed necessary in the District of Massachusetts to provide for the case which may arise in consequence of the rule of the Supreme Court of 1850, relative to the arrest of the person of the defendant, and a rule was passed on the 27th of June, 1855, providing that where the defendant could not be legally arrested, the mesne process might be a warrant to attach his goods, etc., as in the Supreme Court rule. This rule was made prior to the decision of Mr. Justice Curtis, above referred to,<sup>2</sup> and was probably made to meet the case of the defendant not being liable to arrest by virtue of the State law. The language of the rule is, however, sufficiently broad to cover all cases where the defendant cannot be legally arrested.

The question as to the power of the court to grant an attachment of goods when the defendant was out of the jurisdiction, was elaborately considered in an early case as a new question, and the power was asserted by the Supreme Court, Mr. Justice Johnson giving the opinion.<sup>3</sup> It has, however, been held that the 11th

<sup>1</sup> 7th Admiralty Rule.

<sup>2</sup> See *ante*, p. 389, n. 1.

<sup>3</sup> *Manro v. Almeida*, 10 Wheat. 471.

section of the judiciary act of 1789,<sup>1</sup> which provides that, "No civil suit shall be brought before either of said courts (the district and circuit courts), against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ," applies equally to suits in admiralty as to those at common law.<sup>2</sup> But we do not consider this decision to be correct,

<sup>1</sup> 3 U. S. Stats at Large, 79.

<sup>2</sup> *Wilson v. Pierce*, U. S. D. C. California, 1852, 15 Law Rep. 137. The case of *Manro v. Almeida*, 10 Wheat. 473, is explained on the ground that the defendant in that case was an absconding debtor and an inhabitant of the district in which the suit was brought. The decision in the case of *Wilson v. Pierce* was given by Judge *Hoffman*, and is of marked ability, and fully discusses the previous decisions. But we do not regard it as sound in principle, and shall briefly consider some of the objections to it. In the first place, is a suit in admiralty a civil suit within the meaning of that term in the 11th section? We are clearly of the opinion that it is not. The two sections immediately preceding the one in question provide for the jurisdiction of the district courts in *civil* causes of admiralty and maritime jurisdiction, and in some other peculiar cases. The 11th section, on the contrary, provides in the beginning that the circuit courts shall have original cognizance, concurrent with the State courts, "of all suits of a civil nature at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars," etc. Concurrent jurisdiction with the district court is also given of crimes and offences cognizable therein, and it also provides that "no person shall be arrested in one district for trial in another in any civil action before a circuit or district court." Then follows the clause which we have cited in the text. It is thus evident, we think, that this clause was confined solely to the subjects embraced in the first part of the section, viz.: "suits of a civil nature at common law or in equity." And this position we think is clearly supported on authority. It is true that the case of *Manro v. Almeida*, is strictly an authority only to the point that an attachment will issue when the party has absconded from the country, and has goods within the jurisdiction of the court; but that the same rule applied to the case in question was never doubted until the decision of *Hoffman*, J. The point arose in *Clarke v. New Jersey Steam Nav. Co.* 1 Story, 531, where a corporation doing business in New Jersey was sued in the Rhode Island district and their property in that district attached. *Story*, J., who was on the bench when the case of *Manro v. Almeida* was decided, said: "Neither has it been doubted that the process of attachment well lies in an admiralty suit against the property of private persons whose property is found within the district, although their persons may not be found therein, as well to enforce their appearance to the suit, as to apply it in satisfaction of the decree rendered in the suit. Ever since the elaborate examination of this whole subject in the case of *Manro v. Almeida*, this question has been deemed entirely at rest." The facts were the same in *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 344, and it is somewhat singular, that, if the

and have no doubt that a person who resides out of a certain district may be sued in admiralty in that district, if he has property there which can be attached.<sup>1</sup> If goods are in possession of the marshal by virtue of a process issuing from the United States court, a State court cannot by a writ of replevin take them from the possession of the marshal;<sup>2</sup> but the marshal may be sued in trespass in a State court.<sup>3</sup>

### SECTION III.

#### OF FOREIGN ATTACHMENT.

The second admiralty rule also provides that the warrant of arrest may contain a clause that if goods and chattels of the defendant cannot be found, "his credits and effects to the amount sued for in the hands of the garnishees named therein may be attached."

The process of foreign attachment in admiralty is governed by its own rules and principles, and does not depend on, and is not derived from, the custom of London, or the local laws of the different States.<sup>4</sup> Some question has been made whether process of foreign attachment can issue when the defendant is not an inhabitant of the district, but, for the reasons already stated, we are clearly of the opinion that a suit may be brought in the district court where the property is.<sup>5</sup>

By the Thirty-Seventh Rule of the Supreme Court, the garnishee is required, in cases of foreign attachment, "to answer on oath or solemn affirmation, as to the debts, credits, or effects of the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall

objection taken by Judge *Hoffman* is valid, the point should not have been noticed either by court or counsel, or by the three judges who dissented. See also *Bouysson v. Miller*, Bee, 186; *King v. Shepherd*, 3 Story, 349; *Boyd v. Urquhart*, 1 Sprague, 423.

<sup>1</sup> This view has been fully sustained by *Benedict, J.*, in *Atkins v. The Fibre Disintegrating Co.* 1 Bened. Adm. 118.

<sup>2</sup> *Freeman v. Howe*, 24 How. 450.

<sup>3</sup> *Buck v. Colbath*, 3 Wallace, 334.

<sup>4</sup> *Manro v. Almeida*, 10 Wheat. 473.

<sup>5</sup> See *ante*, p. 391.

refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admit any debts, credits, or effects, the same shall be held in his hands liable to answer the exigency of the suit."

It has been held that the warrant of arrest must contain a citation to the garnishee commanding him to appear, and that it is not sufficient to serve upon him a copy of the process, containing the foreign attachment clause, without a citation.<sup>1</sup>

<sup>1</sup> *Smith v. Miln, Abbott, Adm. 373.* The defendant and the garnishee were both defaulted, and on an execution being issued against the "credits and effects" in the hands of the garnishee, he appeared and moved that all proceedings in relation to him be set aside for irregularity. And the court ordered it to be done for the reasons stated in the text. This case was decided in 1848, and in 1858 a somewhat similar question came before the district court in Massachusetts. *Shorey v. Rennell, 1 Sprague, 418.* The garnishee entered an appearance, but gave no stipulation, and put in no answer. After judgment against the defendant, he was called and was defaulted. The proctor for the libellant then filed an affidavit that the garnishee had admitted both before and after the suit was brought, that he owed the principal a certain amount, and moved for execution against the person and property of the garnishee. This was granted, but the execution was afterwards stayed by order of court on motion of the garnishee. The libellant then moved the court for an execution against the garnishee personally, and against his property generally, to the amount of the credits in his hands, as shown by the affidavit. The garnishee then offered his affidavit that he had no goods, effects, or credits of the principal in his hands, and prayed that he might make disclosure under oath, and to answer all interrogatories that might be propounded, and that thereupon he might be discharged. The case was considered at great length and the following conclusions arrived at: that the compulsory process mentioned in the rule was not a process against the trustee to compel him to pay to the creditor his debts to the extent of the credits alleged by the libel to be in the hands of the trustee, but that it was a process to compel him to perform the duty previously prescribed, namely, to answer. The learned judge was also of the opinion that if the garnishee chose to waive his right and submit to a default, it was not imperative upon the libellant to coerce an answer, but if he could, upon a default, show to the satisfaction of the court that the garnishee held debts, effects, or credits, there was no reason why an execution might not issue. It was also said that after such execution, and a refusal by the trustee to pay, he had not the right to make answer that he had not, when summoned, any debts, effects, or credits of the defendant in his hands, unless, perhaps, where there was some other cause than existed at the time of the commencement of the suit, as the discharge of the judgment against the principal by other means, or the destruction of the property in the hands of the garnishee without his fault. The circumstances of the case were somewhat peculiar, an affidavit having been put in stating that the proctor of the libellant had agreed that the garnishee need not make answer in



It will be noticed by the second rule, that the garnishees must be named in the warrant of arrest, and a general order would not be sufficient. And interrogatories to the garnishees, it would seem, may be filed with the libel or afterwards.

#### SECTION IV.

##### OF THE MONITION IN SUITS IN PERSONAM.

The Second Admiralty Rule of the Supreme Court goes on to provide, that the mesne process may be by a simple monition in the nature of a summons to appear and answer to the suit.

The simple monition should be by service on the respondent, and it is issued only when neither an arrest nor an attachment is desired. In admiralty, we think, it is clear that residence does not give jurisdiction, and either the person or his property must be found in the district. If the person, then there may be an arrest or a monition. If the person cannot be found, then there may be an attachment. But the rules of the Supreme Court do not provide for an attachment of goods and a monition, unless the suit is *in rem*, and the reason, we think, is this. In suits *in rem*, all the world is bound, and notice should be given, and the rules so provide; but in suits *in personam*, where property is attached, only the interest of the respondent in the property is bound. Notice to the world, therefore, is not necessary, and it would seem that the attachment was intended to operate as a notice to the respondent.

court, but that if judgment should be rendered against the principal, the answer might be sent to the proctor, and that the default was obtained without due notice. Under these circumstances the default was taken off, and the garnishee was allowed to answer on condition that his answer might be contested by the libellant, and that he should enter into stipulation with surety to pay whatever sums should be decreed against him. It was also stated on the authority of Clerke's Praxis, tit. 34, that ordinarily the sworn answer of the garnishee would be conclusive, although Mr. Benedict, in his Admiralty Practice, § 459, states that the libellant may reply to such an answer and the issue will be tried. Clerke also states that before the answer is sworn to, the libellant may be allowed to show, if he is able, that the garnishee has property of the defendant in his hands; but the court said that the libellant was deprived of this option by the 37th Admiralty Rule. See also McDonald v. Rennel, U. S. D. C. Mass., 21 Law Rep. 157.

In a case before the Supreme Court in 1825, the libellant alleged, that the defendant had absconded and fled beyond the jurisdiction of the court, and that no means of redress remained, unless by process of attachment against the goods, chattels, and credits of the respondent. The libel also prayed a personal monition and likewise *viis et modis*, and the court held that the process was according to the usages of admiralty courts, and decreed that it should issue.<sup>1</sup> This process we do not consider to be necessary in cases *in personam* under our new rules, though it was clearly the old admiralty practice.<sup>2</sup> It was the *citatio publica*, or *viis et modis* of the civil law; from which is probably derived the practice in admiralty courts, the ecclesiastical courts of England, and the probate courts of this country, of giving notice by posting the citation in conspicuous public places. It is a warrant of the court directed to the marshal, requiring him to give public notice in the manner designated, of the filing of the libel, and the time and place for appearance or trial. It should contain a condensed and very brief statement of the allegations and prayer of the libel. A special monition directs the marshal to give notice to certain persons named therein. The general monition is a notice to all parties interested, — notice to the whole world, it is often called, to appear, usually on the first day of the next term of the court, or on the specified return day, and defend the property against the claims of the libellant.

<sup>1</sup> *Manro v. Almeida*, 10 Wheat. 478, 490.

<sup>2</sup> See *Clerke's Praxis*, tit. 21, 28.

## CHAPTER IV.

## OF MESNE PROCESS IN SUITS IN REM.

THE manner of proceeding in actions *in rem*, is clearly defined by the rules of the Supreme Court. In ordinary cases, the process, unless otherwise provided by statute, is by a warrant of arrest, and the marshal is thereupon to take the thing arrested into his possession for safe custody, and give public notice thereof, and of the time assigned for the return of such process, and the hearing of the cause, in such newspaper within the district as the district court shall order, and if there is no newspaper published therein, then in such other public place as the court shall direct.<sup>1</sup>

It is further provided, that in a suit *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, etc., are in the possession or custody of any

<sup>1</sup> 9th Admiralty Rule. This mode of giving notice was expressly adopted in the Collection Act of 1799, c. 22, § 89 (1 U. S. Stats. at Large, 695), which provided that in cases of seizure under the act, the court should "cause fourteen days' notice to be given of such seizure and libel, by causing the substance of such libel, with the order of the court thereon, setting forth the time and place appointed for trial, to be inserted in some newspaper published near the place of seizure, and also by posting up the same in the most public manner, for the space of fourteen days at or near the place of trial." In *The Mary*, 9 Cranch, 144, Marshall, C. J., said: "Where they" (the proceedings) "are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it." See also *The Commander In Chief*, 1 Wallace, 43, 52. In *The Hibernia*, 1 Sprague, 78, the marshal gave notice by publication as directed, and took formal possession of the ship, but did not go on board again, and left no one in possession, and the owner did not know of the arrest till twelve days afterwards. It was held that the marshal was not entitled to custody fees. *Sprague, J.*, said: "In the execution of admiralty process *in rem* the officer should take actual and manifest possession, and hold it in such a manner that inquirers and observers may learn or see that he has such possession."

third person, the court may, after a due monition to such third person, and a hearing of the cause, if any there be, why the same should not be delivered over, award that the same be delivered into the custody of the marshal or other proper officer, if, upon the hearing, the same is required by law and justice.<sup>1</sup>

As a suit *in rem* depends upon the service of the process upon the property, it is obvious that the place where the debt was incurred or the injury done, is not material, and suit may be prosecuted in any district where the *res* is found.<sup>2</sup>

If the property, at the time the warrant of arrest issues, is in the hands of a State officer by virtue of process issuing from a State court, the marshal has no power to take the property, but must delay seizure till after the property has passed from the possession of the officer.<sup>3</sup>

It has been held, however, that this principle does not apply where the person in possession of freight-money has been summoned by trustee or garnishee process in a suit in a State court against the owner of the vessel; and that it is no defence, in answer to a monition from the admiralty court requiring the freight to be brought into that court, to say that the holder of it has been summoned by a garnishee process in the State court.<sup>4</sup>

An admiralty rule provides that in all suits *in rem*, "where the freight, or other proceeds of property are attached to, or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court, and upon failure of the party to comply with the order, may award an attachment or other compulsive process to compel obedience thereto."<sup>5</sup>

And in England, it has been held to be a good defence to a suit

<sup>1</sup> 8th Admiralty Rule. See also *The Harmonia*, 1 W. Rob. 179; *The George Prescott*, 1 Bened. Adm. 1.

<sup>2</sup> *The Propeller Commerce*, 1 Black, 574.

<sup>3</sup> See cases *ante*, p. 198, n. 2.

<sup>4</sup> See *ante*, p. 200, n. 1.

<sup>5</sup> 38th Admiralty Rule.

for freight in a common-law court, that the defendant has, in pursuance of a monition from the court of admiralty, paid the freight into the registry of that court.<sup>1</sup>

<sup>1</sup> *Place v. Potts*, 8 Exch. 705, affirmed in the Exchequer Chamber, 10 Exch. 370, affirmed in the House of Lords, 5 H. L. Cas. 383.

## CHAPTER V.

## OF MESNE PROCESS IN REM AND IN PERSONAM.

REGULARLY, each of the processes given by the second rule is a thing by itself; but it is quite frequent to combine two or more, and sometimes all are contained in one monition. Thus, it may give notice to all the world, and also summon the defendant by name, and contain a warrant or direction to attach the person or the property, directly, or by foreign attachment. But a monition so multifarious as this, would, and must be, very rare. All these things are of course governed in a great degree by the rules of court, and in some districts no attachment of person or property can issue without the *fiat* of the judge. In other districts it issues as a matter of course, either in all cases, or in those of a certain amount or character, or after certain verification of the claim and other facts by the oath of the libellant.

If the suit be both *in rem* and *in personam*, one process, combining the two appropriate processes, may issue, and the marshal executes this process as he would the two if separate; or each process may issue simultaneously, or as each is wanted.<sup>1</sup>

<sup>1</sup> We have seen that, by the rules of the Supreme Court, suits *in rem* and *in personam* may be joined in many cases, and it would seem necessary, when this is done, to issue a monition to the defendants as well as to arrest the property, for, if the owner should appear and defend the suit *in rem*, this would not render him liable *in personam* beyond the value of the property arrested. In petitory and possessory suits, the 20th Admiralty Rule provides that the process shall be by an arrest of the ship, and by a monition to the adverse party or parties to appear and make answer to the suit. In *Blanchard v. Ship Cavalier*, U. S. D. C. New York, *Betts, J.*, it was held that, under this rule, when a vessel is arrested, notice must be given specifically to the adverse party, and that it is not enough to arrest the vessel and publish a general notice to all concerned.

## CHAPTER VI.

## OF CONTUMACY AND DEFAULT.

## SECTION I.

## OF CONTUMACY ON THE PART OF LIBELLANT.

IF in any admiralty suit the libellant shall not appear and prosecute his suit according to the course and orders of the court, he shall be deemed in default and contumacy, and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.<sup>1</sup>

## SECTION II.

## OF CONTUMACY ON THE PART OF THE DEFENDANT.

IF the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte*, and adjudge therein as to law and justice shall appertain.<sup>2</sup>

The power of the court to set aside a default on the part of the defendant is regulated by two rules. The Twenty-Ninth Rule provides that in case of a default for not answering the libel, the court may in its discretion set aside the default, and, upon application of the defendant, admit him to make answer at any time before the final hearing and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

<sup>1</sup> 39th Admiralty Rule.

<sup>2</sup> 29th Admiralty Rule.

By the Fortieth Admiralty Rule the court may in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which, on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof, at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

The Twenty-Ninth Rule, it will be noticed, applies to the case of an application at any time before the final hearing and decree. The Fortieth Rule in terms allows an application within ten days after "the decree has been entered," when "the matter of the libel shall have been decreed against" the defendant.

It is clear that after such a decree has been made, which would give a right of appeal as from a final decree, the defendant cannot apply to have the default set aside under the Twenty-Ninth Rule;<sup>1</sup> and we presume that the Twenty-Ninth Rule would be held to apply to all cases where application is made prior to the final decree, and the Fortieth Rule to cases where the application is made after the final decree is passed.

Under the Twenty-Ninth Rule it has been held that before the court will order a default to be taken off the respondent must show that he has not been guilty of any laches, and that he must also exhibit a meritorious defence either by answer or affidavit.<sup>2</sup>

These rules, we presume, apply as well to suits *in rem* as to those *in personam*.<sup>3</sup>

<sup>1</sup> So held by *Lowell, J.*, in the case of *The Duiveland*, U. S. D. C. Mass., 1866.

<sup>2</sup> *Scott v. The Young America*, 1 Newb. Adm. 107.

<sup>3</sup> This was assumed in *The Duiveland*, *supra*, and in *Scott v. The Young America*, *supra*.



## CHAPTER VII.

## OF THE CLAIM AND OTHER PROCEEDINGS PRIOR TO THE ANSWER.

## SECTION I.

## OF THE CLAIMANT.

IN any suit *in rem*, the property is taken at once into custody, and is considered as in possession of the court from the beginning of the action. The owner of the property, either being personally notified, or taking notice from the general monition, may appear for his interest in the property attached, and put in his claim and answer. These should regularly be separate, but in practice in this country they are frequently and perhaps usually united in one document, which is then called "The claim and answer of A. B." etc. Of the answer to the libel, we will speak presently. The claim must be verified by the oath of the claimant;<sup>1</sup> he may be the owner of the property, or his general agent, or one specially authorized, or the master of the vessel,<sup>2</sup> or, in case of a foreign ship, the consul of the nation to which it belongs.<sup>3</sup>

<sup>1</sup> The 26th Admiralty Rule provides that "In suits *in rem* the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom, or on whose behalf, the claim is made, is the true and *bonâ fide* owner thereof."

<sup>2</sup> See *The Hoop*, 1 Rob. Adm. 129; and cases *infra*. The right of an agent to make a claim is recognized by the 26th Admiralty Rule, which provides that "Where the claim is put in by an agent or consignee, he shall also make oath, that he is duly authorized thereto by the owner, or if the property be at the time of the arrest in the possession of the master of a ship, that he is the lawful bailee thereof for the owner." We presume that this last clause means that if the master claims the vessel for the owner, he shall make oath, etc.

<sup>3</sup> *The London Packet*, 1 Mason, 14, 21; *The Bello Corrunes*, 6 Wheat. 152; *The Antelope*, 10 Wheat. 66. And in the case of *The Ship Adolph*, 1 Curtis, C. C. 87, it was held that a foreign consul had authority to petition the court to

This he can do, however, only as commercial agent, for if the suit or claim grows out of a contested national right, only a diplomatic minister may act. Nor has the consul any power to do more than intervene and protect the interest of the absent. He may carry on the defence, and do everything that is necessary for this purpose, giving security for costs, authorizing proctors, and the like; and for all such acts as these, done in good faith, and not in themselves obviously unreasonable, the principal owner, or the property, would be bound. But the consul would not be permitted to receive the property, or the funds, from the custody of the court, without especial authority from the owner.<sup>1</sup>

The right of an agent to claim property is strictly limited to the case of the absence of the principal. Thus, one part-owner of goods, if both are within the jurisdiction of the court, cannot claim the property for himself and the other owner.<sup>2</sup> Nor can the master of a vessel make the claim, if the owner is present.<sup>3</sup>

Strictly speaking, no person can claim a vessel or other property, unless he has a proprietary interest in the thing claimed, or acts for such person.<sup>4</sup> One who appears because he has a lien or other interest or claim upon the property is called an intervenor. And both classes are specially provided for by the rules of the Supreme Court. It is true that intervenors have been called claim-

order the marshal to pay into the registry proceeds of a sale of property libelled for salvage, in which citizens or subjects of his country were interested, they being absent and having no other legal representative in this country.

<sup>1</sup> See cases in note above.

<sup>2</sup> *The Sch. Lively*, 1 Gallia, 315.

<sup>3</sup> *The Sch. Sally*, 1 Gallia, 401. In the case of *The Sch. Adeline*, 9 Cranch, 244, the court said: "Where the principal is without the country, or resides at a great distance from the court, the admission of a claim and test affidavit by his agent, is the common course of the admiralty. But where the principal is within a reasonable distance, something more than a formal affidavit by his agent is expected. At least, the suppletory oath of the principal as to the facts should be tendered." The objection in this case was not taken till the case came before the Supreme Court, and the court held that it was too late. See also *Spear v. Place*, 11 How. 522.

<sup>4</sup> This distinction is also recognized by the 26th and the 34th Admiralty Rules, the former of which provides for the case of a claimant, and the latter, for a third person intervening.

ants,<sup>1</sup> but this language is inaccurate, the rights of the parties being entirely distinct.<sup>2</sup> An intervenor does not claim the thing in controversy, but only asserts an interest in it. He cannot, therefore, ordinarily be admitted to dispute the cause of action of the libellant, but merely asserts his own claim, and generally that it is superior to that of the libellant.<sup>3</sup> It has, however, been held that an attaching creditor may intervene and contest the suit, the owner not defending.<sup>4</sup> And assignees of a bankrupt ship-owner may appear for the benefit of the general estate, and contest the appropriation of the general proceeds, against the assignees of the freight, who seek to make the ship alone liable.<sup>5</sup> And where there are several libellants asserting liens on the vessel independently of each other, the court will allow those, not having the preference to contest the preceding liens, if no claimant appears.<sup>6</sup>

It has been held in England that, in a suit on a bottomry bond, the owner of the cargo who has paid freight into court has no standing in court to contest the amount due on the bond as against ship and freight, although before the execution of the bond part of the cargo was sold by the master, and the proceeds applied to ship's expenses.<sup>7</sup> We do not think, however, that this decision would be applicable in this country, for here the loss of goods may be set off against the claim for freight.

A mortgagee may come in and defend his interest in the ship, but can rely only on defences open to the owners of the ship.<sup>8</sup> And underwriters having a substantial interest may be allowed to defend.<sup>9</sup>

<sup>1</sup> Thus, in *The St. Jago de Cuba*, 9 Wheat. 409, the court speak of a claim filed by seamen for their wages.

<sup>2</sup> In *United States v. 422 Casks of Wine*, 1 Pet. 547, 549, a full and accurate definition of a claimant and his duties is given.

<sup>3</sup> Thus in a petitory suit material men claiming a lien on the vessel for supplies cannot object to the granting of the petition, because their claim does not depend upon the title to or possession of the vessel. *The Toronto*, 1 Sprague, 170.

<sup>4</sup> *The Mary Anne*, Ware, 104. The vessel in this case had been attached by a creditor in the State court, and was afterwards seized by the government for a forfeiture, and the creditor was allowed to defend the suit.

<sup>5</sup> *The Dowthorpe*, 2 W. Rob. 73.

<sup>6</sup> *The George Prescott*, 1 Bened. Adm. 4.

<sup>7</sup> *The Gem of the Nith*, Brow. & L. Adm. 72.

<sup>8</sup> *The Chieftain*, Brow. & L. Adm. 104.

<sup>9</sup> *The Regina del Mare*, Brow. & L. Adm. 315.

The Thirty-Fourth Admiralty Rule has also been construed to allow third parties to come in, not merely as intervenors, but as parties subrogated to the rights of the original claimant by operation of law, as in the case of the death of a party, after the case came before the court. And an underwriter, who, after the case came before the circuit court on appeal, accepted an abandonment made before the suit was brought, was allowed to intervene as *dominus litis*.<sup>1</sup>

So, it is said that if a suit is commenced by the owners of a vessel, in a cause of collision, the owners of the cargo which was on board the vessel of the libellants, may intervene for the protection of their interests, at any time before the sum due is paid out of the registry of the court.<sup>2</sup> And when a person becomes interested in the subject-matter of a suit after it has commenced, as a mortgagee who has taken possession under his mortgage for breach of condition, he may be admitted as claimant.<sup>3</sup>

If the party claiming the goods cannot make good his title to them, the court will not give them up, if the libellant fails in his suit, but will retain them for the actual owner,<sup>4</sup> and it is said to be usual to retain them for a year and a day.<sup>5</sup>

After a case has gone before the Supreme Court on appeal,

<sup>1</sup> The Brig Ann C. Pratt, 1 Curtis, C. C. 340. Curtis, J., said: "The 34th Rule seems well enough adapted to such cases. Unless this construction be put upon it, I perceive no provision even for the death of a party, after an appeal to this court; and as this court does not possess the power to remit an admiralty cause to the district court, and there is no rule expressly providing for a supplemental libel to be filed here, some rule to prevent the abatement of suits is needful, and I shall hold this 34th Rule to be applicable to all such cases." Underwriters, however, cannot intervene until they have accepted the abandonment. The Ship Packet, 3 Mason, 255; The Ship Henry Ewbank, 1 Sumner, 400; The Sch. Boston, 1 Sumner, 328, 332; The Bee, Ware, 332, 335.

<sup>2</sup> The Commander In Chief, 1 Wallace, 43. In The Wm. Bagaley, 5 Wallace, 377, 412, a cause of prize, after the appeal to the Supreme Court, the owners of part of the vessel and cargo filed a petition asking leave to intervene for their interests. It was held that they could not, and the court said: "Settled rule in this court is that no one but an appellant in such a case can be heard for the reversal of a decree in the subordinate court."

<sup>3</sup> The Jenny Lind, 3 Blatchf. C. C. 513.

<sup>4</sup> The Boat Eliza, 2 Gallis. 4, 11; United States v. 422 Casks of Wine, 1 Pet. 547, 550.

<sup>5</sup> Stratton v. Jarvis, 8 Pet. 4.

a new claim cannot be presented in that court, but it may be presented to the circuit court, when the cause is remanded.<sup>1</sup>

It may also be added in this connection, that if a party appears and files a claim, he thereby waives all objection to the regularity of the process.<sup>2</sup> And an absolute appearance once given cannot be recalled, for all objections to the jurisdiction on account of defective process, and other formal matters, should be taken on the earliest occasion.<sup>3</sup>

## SECTION II.

### OF STIPULATIONS.

By virtue of their general admiralty jurisdiction, the district courts may in cases *in rem* deliver property on bail or stipulation,<sup>4</sup> and enforce summarily, by judgment and execution, the security, or compliance with the terms of the bailment. Whether this security be under seal, or like a recognizance without seal, makes no difference. And if it have a seal, and is yet void as a bond, it may be good as a stipulation.<sup>5</sup> The court always orders that the stipulation be taken on the direct application for the property by the claimant; and having jurisdiction over the principal cause, has it necessarily over all its incidents, and may by monition, attachment or execution, enforce its decrees against all who become parties to the proceedings.<sup>6</sup>

<sup>1</sup> The Societé, 9 Cranch, 209.

<sup>2</sup> The Merino, 9 Wheat. 391. See also *post*, p. 427, n. 2.

<sup>3</sup> The Blakeney, Swabey, Adm. 428.

<sup>4</sup> The Brig Alligator, 1 Gallis. 145. In *Lane v. Townsend*, Ware, 286, it was held that "any instrument taken to secure the appearance of a party to answer a libel in the admiralty, is to be considered not as a bail bond at common law, but as an admiralty stipulation, and construed according to the rules and practice of the courts of admiralty, touching such stipulations," and that "stipulations taken in the progress of a cause for the purpose of sustaining and rendering effectual the jurisdiction of the court, are to be interpreted as to the extent and limitation of the responsibility created by them, by the intention of the court which required them, and not by the intention of the parties who are bound by them."

<sup>5</sup> The Brig Alligator, 1 Gallis. 145.

<sup>6</sup> See *The Brig Hollen and Cargo*, 1 Mason, 431; *The Brig Alligator*, 1 Gallis. 145-149; *The Flora*, 1 Hagg. Adm. 298.

If there be separate and distinct interests, there must be separate claims and answers, and separate stipulations.<sup>1</sup> But if one or more parties in interest refuse to make answer or claim, or enter into stipulation, or are unable to do so, their contumacy or inability will not be permitted to injure the other parties in interest, who may proceed by themselves.<sup>2</sup>

In the case of a bottomry bond, the ship of which the possession is demanded by the obligee is the very security agreed upon, and usually the only one, for the debt of the obligor, and for this reason it is said, that admiralty will not deliver the ship to the obligor, even on stipulation with sureties, without the consent of the libellant.<sup>3</sup> So it is said, in respect to a suit for salvage,<sup>4</sup> but the Eleventh Admiralty Rule makes no such distinctions.

Where a possessory action was brought by the owner of seven-eighths of a vessel, and the master, who was in possession, and owner of the other eighth, applied for leave to bond the vessel before filing his answer, and while the court was sitting to dispose of the admiralty cases, the motion was denied.<sup>5</sup>

These stipulations are somewhat similar to those of the civil law, on and by which the party stipulating enters into certain engagements, and certain others guarantee the due execution of these engagements as his sureties, or, as they are sometimes called, *fide-jussores*, which is their name in the civil law.<sup>6</sup> These stipula-

<sup>1</sup> *Stratton v. Jarvis*, 8 Pet. 4.

<sup>2</sup> *The Mary*, 9 Cranch, 126.

<sup>3</sup> *Dunlap's Adm. Practice*, 176.

<sup>4</sup> *The Ship Nathaniel Hooper*, 3 Sumner, 542, 562. Mr. Justice Story said the proper course, if the property was perishable or might sustain injury from the delay, would be to have a sale of it authorized by the court.

<sup>5</sup> *The Rainbow*, 1 Bened. Adm. 40. See also *The Mary*, Law Rep. 1 Adm. 335.

<sup>6</sup> See *Lane v. Townsend*, Ware, 286, for a learned exposition of the subject of bail bonds, and stipulations by the civil and by the common law. In *Clerke's Praxis*, additions to title 4, Hall's ed. p. 12, it is said: "Securities, or cautions, as they are termed by civilians, are of three sorts:—

"1. *Judicatum Solvi*; by which the party is bound absolutely to pay such sum as may be adjudged by the court.

"2. *De Judicio Sisti*; by which he was bound to appear from time to time during the pendency of the cause to abide the sentence and also to pay a tenth part of the sum in dispute if he should be defeated.

"3. *De Rato*; by which he engaged to ratify and confirm the acts of his proctor.

tions are of many kinds ; they differ, principally, however, accordingly as the action is *in personam* or *in rem*, and the forms in blank are usually provided by the clerk.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, it is provided by the Third Admiralty Rule, that the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit, and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered there in the court, to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties, by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court.<sup>1</sup>

“With respect to the manner in which these cautions were taken, they were : —

“1. *Cautio fidejussoria* ; by sureties.

“2. *Pignoratitia* ; by deposit.

“3. *Juratoria* ; by oath.

“4. *Nudi promissoria* ; by bare promise.”

Where the stipulation is merely *in judicio sisti*, the bail may surrender the debtor at any time before a decree against them. *Lane v. Townsend, Ware, 286.*

<sup>1</sup> See *Gardner v. Isaacson, Abbott, Adm. 141.* In a case in Massachusetts, entitled, *In the Matter of the Bail of Snow, 2 Curtis, C. C. 485*, the condition of the bail bond was merely to appear and answer, and abide the final decree, and nothing was said about paying the damages. Judgment had been obtained against the defendant, and on application of the plaintiff, the court being satisfied that the defendant was beyond the seas, ordered a monition to issue to the bail to show cause why he should not pay the judgment, and why process should not issue against him. It was contended that there was no breach of the bond until an execution should have been issued and returned *non est inventus*, but *Curtis, J.*, said : “I am of opinion that it is not necessary to take out an execution against the principal to charge such bail in the admiralty. It is in conformity with the practice of the high court of admiralty in England to proceed summarily against the bail, in a case where the principal has gone out of the kingdom, by issuing a monition to the bail to show cause why execution should not go against them, without citing the principal, or issuing any process against him. It is upon this practice that the rule No. 3, for the admiralty practice of the district court, was framed.” In New York, the practice is not to obtain a monition, but to issue an execution at once against the defendant and his stipulators. *Gaines v. Travis, Abbott, Adm. 422 ; Holmes v. Dodge, id. 60.*

By an additional rule, passed December term, 1850,<sup>1</sup> it is ordered that in all suits *in personam* where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State where an arrest is made, upon similar or analogous process issuing from the State courts.

And in a suit *in personam* where property is attached, it is provided by the Fourth Rule that the attachment may be dissolved by the defendant giving a bond or stipulation, with sureties. The conditions of the bond are the same as are provided by the first rule, except as to that which relates to the appearance of the defendant, which is omitted.

The Fifth Rule provides that bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court who is authorized by the court to take affidavits of bail and depositions in cases pending before the court. The Thirty-Fifth Rule is much to the same effect, with some differences. It provides that "stipulations in admiralty and maritime suits may be taken in open court, or by the proper judge at chambers, or under his order, by any commissioner of the court who is a standing commissioner of the court, and is now by law authorized to take affidavits of bail, and also depositions in civil causes pending in the courts of the United States." The former rule has been supposed, by Mr. Conkling, to be useless, but it may well be that the latter rule was intended only to provide for stipulations for costs, and not for bonds or stipulations. The Thirty-Fourth Rule provides that intervenors shall be required to give stipulations for costs, and the Thirty-Fifth Rule may have been intended to apply merely to such stipulations. We are not able, however, to express so definite an opinion on this point as we could wish, and further adjudication is also necessary to determine whether, under the Thirty-Fifth Rule, the words "or under his order," were intended to prevent a commissioner from acting except under the order of the judge, or whether they have reference to a special commissioner.

By the Sixth Rule, it is provided that "in all suits *in personam* where bail is taken, the court may, upon motion, for due cause shown, reduce the amount of the sum contained in the bond or

<sup>1</sup> 10 How. v.



stipulation therefor ; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required, by the order of the court, to be given, upon motion and due proof thereof.”<sup>1</sup>

If the suit be *in rem*, the stipulation is given for the purpose of obtaining possession of the property, and not for that of liberating the person ; and the Eleventh Admiralty Rule provides that in such a case the vessel “ may be delivered to the claimant, upon a due appraisement to be had under the direction of the court, upon the claimant’s depositing in court so much money as the court shall order, or upon his giving a stipulation, with sureties, as aforesaid ; and if the claimant shall decline any such application, then the court may, in its discretion, upon the application of either party upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of as it may be deemed most for the benefit of all concerned.”

By the act of 1847,<sup>2</sup> it is provided “ That in any case brought in the courts of the United States, exercising jurisdiction in admiralty, where a warrant of arrest or other process *in rem* shall be issued, it shall be the duty of the marshal to stay the execution of such process, or to discharge the property arrested, if the same has been levied, on receiving from the claimant of the same a bond or stipulation in double the amount claimed by the libellant, with sufficient surety to be approved by the judge of the said court, or in his absence by the collector of the port, conditioned to abide and answer the decree of the court in such cause ; and such bond or stipulation shall be returned to the said court, and judgment on the same, both against the principal and sureties, may be recovered at the time of rendering the decree in the original cause.”

If the stipulation is for a sum certain, the surety cannot be compelled to pay more than that sum, although the stipulation

<sup>1</sup> We should, however, suppose, notwithstanding this rule is confined to the case of bail actually given, and to the insolvency of the sureties, that the court, by virtue of its general admiralty power, would have the power to order new sureties to be given if the old ones were insufficient, though not actually insolvent.

<sup>2</sup> C. 55, 9 U. S. Stats. at Large, 181. The title of this is, “ An act for the reduction of the costs and expenses of proceedings in admiralty against ships and vessels.” The language of the act is, however, general, and would embrace any other property as well as vessels.

is conditioned to pay such sum as shall be awarded by the final decree.<sup>1</sup>

It has been held in England that where the owners of a vessel are only liable to the extent of the value of the ship and freight, the bail are only liable to the same extent, although the action may have been entered and the bail given in a larger sum;<sup>2</sup> and probably the same rule would obtain in this country, in similar cases, for the stipulation is regarded as a substitute for the thing itself, and the stipulators are liable for no more and no less than the thing itself, if it had remained in the custody of the court.<sup>3</sup> And the valuation in the stipulation cannot be increased in the appellate court.<sup>4</sup> It has also been held that if a claimant receives the vessel upon a stipulation to pay into court its appraised value with interest and costs, he cannot insist on allowances because he has discharged liens for seamen's wages; and if much delay has intervened, of which he has had the benefit, he must pay interest.<sup>5</sup>

There has been much discussion as to the effect of the delivery of the property on stipulation or bail, upon the right of the court to order the rearrest of the property for any cause. It has been held that if a vessel is arrested and delivered up on bail, and then judgment is given in a larger sum than the bail, the court will not order the rearrest of the vessel.<sup>6</sup> There can, however, be no

<sup>1</sup> *Brown v. Burrows*, 2 Blatchf. C. C. 340.

<sup>2</sup> *The Duchesse De Brabant*, Swabey, Adm. 264.

<sup>3</sup> *The Ann Caroline*, 2 Wallace, 538. In *The Palmyra*, 12 Wheat. 1, the case had been dismissed in the Supreme Court on the ground that there had been no final decree in the circuit court, but as it afterwards appeared that this arose from a mistake of the clerk, and that a final decree had actually been made, the court ordered the cause to be reinstated, although it was objected that they had no authority to do so after a dismissal, because it might operate to the prejudice of the stipulators, to whom the vessel had been delivered. *Rice v. Minnesota* R. 21 How. 82.

<sup>4</sup> *Houesman v. Schooner North Carolina*, 15 Pet. 40, 51.

<sup>5</sup> *The Virgin*, 8 Pet. 538.

<sup>6</sup> *The Kalamazoo*, 9 Eng. L. & Eq. 557. See also *The Commander In Chief*, 1 Wallace, 43, 52. In *The Wild Ranger*, Brow. & L. Adm. 84, the owners of one vessel sued the owners of another in a cause of collision. The vessel was arrested and bail given in the sum of £3,500. Subsequently the ship was arrested by the owners of cargo on the other vessel and was sold under order of court, and the proceeds brought into the registry. The damages in the first action exceeded the sum of £3,500, and application was made that the bal-

doubt of the power of a court of admiralty before judgment to allow an amendment of the libel, and the rearrest of the vessel. But this power would be exercised with great care and caution.<sup>1</sup>

ance should be paid out of the proceeds in the registry remaining after the damages in the second action were paid, and that costs and interest should also be paid out of this fund. Dr. *Lushington* rejected the motion and said: "Bail given for a ship in any action is a substitute for the ship; and whenever bail is given, the ship is wholly released from the cause of action, and cannot be arrested again for that cause of action. Also if the ship is sold in another action, the proceeds, save by the operation of some act of Parliament, are liable only to the payment of liens. In this case, then, after bail was taken, the ship herself could never have been made liable for damage or interest; and I am of opinion that the proceeds of the ship sold in another action are in legal consideration, as the ship itself, and, therefore, cannot be made available to answer this demand."

<sup>1</sup> In *The Hero*, Brow. & L. Adm. 447, a motion was made to amend the *præcipe* by which the cause was instituted by altering the sum in which the action was entered from £ 1,000 to £ 2,600, and to decree a warrant for the rearrest of the vessel. It was claimed that the action had been entered in the wrong sum by mistake, and that the mistake had not been discovered for eight months. Dr. *Lushington* granted the motion and said: "In *The Kalamazoo* and *The Wild Ranger*, are expressions which, literally interpreted, would indicate that I have no power to grant a rearrest for the same cause of action after the property has been released on bail; but those expressions must be read subject to the fact which formed the ground of the decision in each of those cases, — that the cause of action had passed into *res judicata*. I am of opinion that where application to increase the amount of the action is made before judgment has been pronounced, the court has power to direct measures to be taken to do full justice to the plaintiff. I am of opinion, therefore, that the court has power to grant this motion, and that under the circumstances it is just and proper that the plaintiffs should be relieved from the mistake committed. I allow the rearrest, but the plaintiffs must pay all the expenses arising from their mistake."

In *The Flora*, Law Rep. 1 Adm. 45, the vessel and cargo were arrested in a cause of collision in the sum of £ 1,000. Bail was given, and the vessel and cargo released. The vessel was then repaired at a cost of £ 400. Subsequently the plaintiffs increased the amount of their action to £ 3,000, and rearrested the vessel and cargo. No further bail was given. Dr. *Lushington* held the arrest to be valid, but ordered the bail bond to be cancelled, and that the value of the vessel should be limited to her value at the time of the first arrest. In *The Union*, 4 Blatchf. C. C. 90, a vessel was arrested for a collision, and bail given to the extent of the damages claimed in the libel. The vessel was delivered up and afterwards sold. Subsequently the libellants had leave to amend their libel by increasing the damages, and the district court ordered the vessel to be redelivered up or bail to an increased amount to be given. On appeal this decree was reversed, the court holding that the vessel was not further liable. It was admitted that in a case of mistake or fraud committed in entering into the stipulation it would be

It has also been questioned whether the owners of a vessel who appear and contest a suit *in rem* are personally liable for the costs when the damages and costs are greater than the stipulation. We think they are so liable, on the ground that by appearing they submit to the jurisdiction of the court.<sup>1</sup> In a case where a vessel and cargo were sued on a bottomry bond, and the owners of the cargo gave bail for the value of the cargo, and did not contest the bond or in any way increase the amount of costs by their conduct, it was held that they were not personally liable for costs.<sup>2</sup>

competent for the court to relieve the parties. See also *The White Squall*, 4 Blatchf. C. C. 103.

<sup>1</sup> *The Temiscouata*, 2 Spinks, 208, was a cause of damage for collision. The action was entered for £ 250, and bail given to that amount to answer damages and costs. The decree was for the libellants. The damages were less than £ 250, but the damages and costs exceeded that sum. The defendants' proctor tendered £ 250. The libellants prayed that defendants should be personally liable for the remainder of the costs. The defendants required the original action to proceed by plea and proof, which increased the costs. Dr. *Lushington* said: "The liability of the party proceeding against is defined by the statute; it is the value of the property, and of the costs incurred. Has the party proceeding narrowed his remedy by the amount at which the action was entered and the bail taken, and I should add, bail taken for the damage and expenses? Had the bail been taken for the full amount of the value of the ship, and the damages and costs exceeded that amount, I should certainly have made the owners pay the costs, as I did in one of the cases referred to. The difficulty is, that the party here has limited his own demand, and I think it would require peculiar circumstances to induce me to make the owner liable for any amount beyond that demand, and the bail taken. I say peculiar circumstances, because I have not the least doubt of the authority of the court so to do, and no question but that it would be within the limits prescribed by the act of Parliament. In ordinary cases I should be disposed to think that the party proceeding had put the limitation upon himself, and that I ought not to extend it further."

Held, that this case being of small amount might easily have been settled by act on petition, and that it could not have been anticipated that the owners of the vessel would require the expensive proceeding of plea and proof. The prayer of the petition was granted. Dr. *Lushington* commented at length on the preceding cases.

<sup>2</sup> *The Nostra Signora del Carmine*, 1 Spinks, 303. In *The Mellona*, 6 Notes of Cases, 62, action entered in £ 1,100; bail given in £ 540 as the value of the vessel, and also £ 100 to answer costs beyond the value of the ship. The decision was that only £ 520, together with the costs of the reference could be given. In *The Temiscouata*, 2 Spinks, 208, Dr. *Lushington*, speaking of the case of *The Mellona*, said: "That case is so complicated in its circumstances that I cannot rely upon it as entirely applying to the present, and I wish to observe that in

It has been held that on a suit by one person against a vessel for injury caused by a collision, the owners may, by showing to the court that there are several other demands against the vessel, growing out of the same occurrence, which exceed the value of the vessel and freight, file a stipulation in the appraised value of the vessel and freight, for the benefit of all persons entitled to liens upon her for losses occasioned by the collision, and that on the filing of the stipulation the vessel and her owners might be declared to be discharged from all liability for losses arising out of the collision.<sup>1</sup>

If it is necessary for the purposes of justice to take possession of property which has once been delivered up, on a stipulation, the proper process against a person who is in possession, if he is not a party to the stipulation, is a monition, and not an execution in the first instance.<sup>2</sup>

By these stipulations, the sureties agree and consent that executions may issue against them, their heirs, executors, and administrators, goods and chattels, for whatever sum may be decreed if the stipulation be forfeited. Whether process founded thereon would issue against the lands of the principal stipulator, or his sureties, was not positively determined by the authorities,<sup>3</sup> prior

reading over that case carefully there is one expression in page 72, which either dropped from me inadvertently, or was misconceived by the reporter; at any rate it is ambiguous. I there state that the court was bound by the act of Parliament to reduce the amount of the bail to the value of the ship; and I said, on the other hand, that, 'supposing bail was given to an insufficient amount, the court would raise it to the proper amount.' Now, that is an ambiguous expression. I did not mean that it was possible to compel the individuals giving bail to exceed the amount for which they had made themselves voluntarily responsible, — that would be absurd; but what I meant was, that the court would have a right to require further security from those who owned the vessel. I mention that for the purpose of preventing misapprehension hereafter."

<sup>1</sup> The Steamboat City of Norwich, 1 Bened. Adm. 89.

<sup>2</sup> The Grand Para, 10 Wheat. 497.

<sup>3</sup> It is said in *Clerke's Praxis*, by Hall, p. 13, that "the securities in admiralty, though in the nature of recognizance, do not authorize the court to proceed against lands." And this, we presume, is the rule in England. See *Marriott's Form*. 273. By the old third rule of the first circuit, the sureties were obliged to stipulate that the execution might run against their lands. Nothing is said on this subject in the Rules of the Supreme Court, passed in 1842, but clearly the lands of the defendant could not be attached under the 2d Rule, nor seized on

to the passage in 1862, of a rule of the Supreme Court, which allows this to be done.<sup>1</sup>

And if the principal, in a suit which does not survive, dies, the sureties should, regularly, suggest the death to the court, and procure an order for their discharge.

If any obligor to an admiralty stipulation die *pendente lite*, the court may proceed against the survivor, or at the option of the plaintiffs against the representatives of the deceased also, and, in one case, the vessel having been forfeited to the United States, the court said that if the surety would bring the money into court, it would, with the assent of the district attorney, allow him to proceed against the principals in the bond and their representatives in the name of the United States, to enforce his indemnity.<sup>2</sup>

Stipulators are not discharged by an amendment, even though no notice be given to them.<sup>3</sup>

execution against the defendant under the 21st Rule. We should not suppose that stipulators would be liable for more than the principal. In a case in New York, it however seems to be assumed that the lands of the stipulators are liable. The suit was in *personam*, and on judgment being obtained, an execution issued against the real estate of the stipulator. The only questions made were whether a judgment obtained in the southern district of New York, was a lien on the land in any county of the district, and also whether it was necessary to file the transcript of the judgment in the office of the clerk of the county in which the lands were situated, and whether the statutes of the State applied. The court answered the first question in the affirmative, and the last two in the negative. *Cropey v. Crandall*, 2 Blatchf. C. C. 341. See also *Ward v. Chamberlain*, 2 Black, 430, 9 Am. Law Reg. 171. And in 1860, it was held that the land was liable. *The Kentucky*, 4 Blatchf. C. C. 450.

<sup>1</sup> 1 Black, 6.

<sup>2</sup> *The Ship Octavia*, 1 Mason, 149. This case, it will be perceived, was decided before the new rules were passed, but we presume the law is the same now.

<sup>3</sup> In *The Harmony*, 1 Gallis. 125, is the following *dictum* of Story, J.: "I will only add that a third objection made, that it might affect the right of sureties on the bond given for the property, has not been considered of weight in any cases at common law. Where the property is delivered on bond, it is too much to contend, that the rights of the court over it can be increased or diminished by that circumstance. Every person so bailing the property is considered as holding it subject to all legal dispositions by the court. *A fortiori* the objection would, with great difficulty, find support in a court exercising admiralty jurisdiction. In *Newell v. Norton*, 3 Wallace, 257, a suit in a cause of collision was brought in *rem* against the vessel, and against the captain, owner, and pilot in *personam*. The

After a vessel has been given up to the stipulators, if the vessel is arrested on other suits brought against her, it has been held that the stipulators may, by petition to the court, be released from their stipulations, and the vessel then will be held by the marshal on the former warrant of arrest as well as on the latter.<sup>1</sup> Such an application will not, however, be entertained by the court until the process in the second case is returned to court.<sup>2</sup>

By the practice of the English admiralty, sureties to a bail-bond must not be partners; and if a bond is given signed by partners, the court will order the rearrest of the vessel.<sup>3</sup>

### SECTION III.

#### OF DELIVERY ON APPRAISEMENT.

We have already seen that the court may in certain cases order property to be sold;<sup>4</sup> and it may also, upon the application of the claimant, order a delivery thereof to him, upon a due appraisement<sup>5</sup> to be had under the direction of the court, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with sureties as the court shall direct to abide by and pay the money awarded by the final decree.<sup>6</sup>

vessel was then delivered up on a bond being given in the usual way. An amendment was afterwards allowed striking out the names of the owner and pilot, and the suit proceeded against the vessel and master. It was held that the stipulators were not discharged. In *The Hypodame*, 6 Wallace, 216, a libel was filed claiming \$6,000 damages. A stipulation was given in the sum of \$7,250. A decree was rendered for over \$7,500. Held, that on the libel being amended a decree might be entered for the amount of the stipulation.

<sup>1</sup> *The Jewess*, 1 Bened. Adm. 21, n.

<sup>2</sup> *The Empire*, 1 Bened. Adm. 19.

<sup>3</sup> *The Corner*, Brow. & L. Adm. 161.

<sup>4</sup> See *ante*, p. 338.

<sup>5</sup> In *The Cargo ex Venus*, Law Rep. 1 Adm. 50, the property was delivered up on appraisement. The owners afterwards sold it for a less amount, and claimed that they were liable only for the proceeds of the sale; but the court held that the appraisement was conclusive.

<sup>6</sup> 10th Admiralty Rule.

## SECTION IV.

## OF STIPULATIONS FOR COSTS.

By the ancient rules of admiralty, the plaintiff was required to find *fidejussores* for the prosecution of the suit, for the payment of the defendant's costs if the plaintiff should fail in the cause, and for the production of the plaintiff personally as often as he might be called.<sup>1</sup> In England, this seems now to be confined to the case of non-residents, and it is not then enforced when the defendant has arrested sufficient property of the plaintiff in another suit.<sup>2</sup> In this country various rules have been enacted by the different district courts on this subject. By the old seventh rule of the first circuit, on motion of the defendant, the court would oblige the plaintiff, except where the suit was for the United States, on pain of dismissing the libel, to give a stipulation with sureties to appear from time to time and abide all orders, etc., and to pay all costs. But this rule was not applied where the libellant was too poor to furnish a stipulation, and he was then admitted to give the juratory caution; but even this was not considered essential unless it was demanded by the defendant.<sup>3</sup>

In the Southern District of New York, it was provided by Rule Forty-Four, that no process *in rem* should issue, or appearance or answer be received, or third party be permitted to intervene and claim, except on the part of the United States, unless a stipulation to pay costs was first entered into.<sup>4</sup> Seamen suing for wages for services on board American vessels,<sup>5</sup> and salvors bringing property

<sup>1</sup> Clerke's Praxis, tit. 14.

<sup>2</sup> See *The Sophie*, 1 W. Rob. 326; *The Volant*, id. 383; *The Franz & Elize*, Lush. Adm. 377; *The Wild Ranger*, Lush. Adm. 553. In *The D. H. Peri*, Lush. Adm. 543, it was held that a foreign plaintiff suing *in rem* would be required to give security of costs, but not security for damages as for a wrongful arrest of the defendant's vessel. So held also in *The Mary*, Law Rep. 1 Adm. 335, which was a cause of possession, although it was admitted to be the practice not to release a vessel on bail in such a suit.

<sup>3</sup> *Polydore v. Prince, Ware*, 402.

<sup>4</sup> The 44th Rule was formerly numbered 14.

<sup>5</sup> 45th Rule. This rule has been held not to apply to an agreement made by a seaman with the master outside of the shipping articles, and the seaman in such a case must file a stipulation for costs. *The Great Britain*, Olcott, Adm. 1.



into port are not required to give such security in the first instance, but after the arrest of the property the court may order it to be given for adequate cause shown. By a new rule established in 1849, in suits *in personam* for wages under fifty dollars, the usual stipulation is required, except in certain specified cases. In the Northern District of New York, the rule is confined to cases where the libellant is a non-resident, and does not apply to suits for wages or for salvage when the salvors have come into port in possession of the property libelled; and the court has a discretionary power to require a stipulation where the libellant is a resident.

This subject is not provided for by the Rules of the Supreme Court.

The practice not to call on seamen for security is only from a presumption of their inability, and is not applied where this presumption disappears.<sup>1</sup>

In respect to the liability of the defendant to give bail, the Twenty-Fifth Rule of the Supreme Court provides "that in all cases of libels *in personam*, the court may in its discretion, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation with sureties in such sum as the court shall direct, to pay all costs and expenses, which shall be awarded against him in the suit upon the final adjudication thereof, or by any interlocutory order in the process of the suit."<sup>2</sup> In suits *in rem* the claimant, upon putting

<sup>1</sup> *Wheatley v. Hotchkiss*, 1 Sprague, 225. The libel in this case was dismissed without costs, and on the libellant claiming an appeal the respondent moved that he be required to give security for costs. It appeared that the respondent had recently paid the libellant over \$400 in a suit for a tort. Judge Sprague said, "that the practice of exempting seamen from giving security for costs, was founded on their presumed inability. Any other person may sue in the admiralty without giving security, upon proof of inability; and a seaman may be required to give security, if his ability is proved. This libellant has had one hearing without giving security, and now upon his claiming an appeal, there is evidence tending to show his ability to give security for costs, and he must stipulate with surety for such costs as the appellate court may decree, unless he prove himself unable to do so by satisfactory affidavits."

<sup>2</sup> This rule, it will be perceived, is limited by its terms to the case of an action *in personam*, where no bail has been taken and no attachment of property has been made, and the defendant has appeared. It would seem only to apply to the

in his claim, is obliged by the Twenty-Sixth Rule to file a stipulation with sureties in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal, by the appellate court.<sup>1</sup> The Thirty-Fourth Rule makes the same provisions where a party intervenes in a case.<sup>2</sup>

A stipulation for costs is not, however, essential to render a claimant liable for fees for services rendered by the clerk of the court, but he is liable for these from his relation to the suit as *dominus litis*.<sup>3</sup>

case where the party has appeared under the command of a monition, and this is the view taken of it by Judge *Betts*, who accordingly held, that where a party is arrested, he is not entitled to be discharged on giving bail to appear and pay all costs, and to perform and abide all orders and decrees of the court in the cause, and to deliver himself personally for commitment in execution thereof, but that he must give a bond to satisfy the decree made against him. *Gardner v. Isaacson*, Abbott, Adm. 141. Judge *Conkling*, however, supposes that the rule applies to the case where the defendant is arrested, and cannot get bonds to satisfy the decree, and that he is then entitled to be liberated on giving a bond for the payment of costs.

<sup>1</sup> In *United States v. Sch. Lion*, 1 Sprague, 399, which was a libel of information against a fishing vessel alleging it was forfeited by violation of law in obtaining the fishing bounty, no claim was put in or stipulations for costs given. It was suggested that the owners from poverty were unable to give security for costs, and requested the court to require the government to produce full proof of the allegations in the libel. This request was granted on the owners filing an affidavit of ownership, inability to give a stipulation, and that they had a good defence. "The affidavit must be equivalent to a claim and answer, and must fully set forth the grounds of defence."

<sup>2</sup> In *United States v. Sch. Lion*, 1 Sprague, 399, 401, a libel of information against a vessel for forfeiture had been dismissed with a certificate of reasonable cause. Some time before this the vessel had been sold, and the proceeds paid into the custody of the court. The owner was allowed to intervene without giving a stipulation with surety for costs, there being no other claimant of the proceeds, and no contestation on which costs could arise.

<sup>3</sup> In the *Matter of Stover*, 1 Curtis, C. C. 201.

## SECTION V.

OF THE POWER OF THE COURT TO ORDER DOCUMENTS TO BE  
PRODUCED BEFORE ISSUE IS JOINED.

The practice of the court of chancery was formerly to require the defendant, if he wished to inspect documents in the possession of the plaintiff, to file a cross bill and pray for a discovery.<sup>1</sup> In one case, however, the court ordered an instrument to be produced for inspection ;<sup>2</sup> but this case is generally considered as of but little authority, and has not been followed.<sup>3</sup> The rule at common law is that the defendant is entitled to inspect any instrument in the possession of the plaintiff, which is the subject of the action, and on which the plaintiff bases his claim.<sup>4</sup>

The power of the court of admiralty in such cases has not, until recently, been invoked, and no definite rule is to be found in the text-books or in the earlier reports. In 1857, the question arose whether, in a suit on a contract, which contract was partly in writing and partly oral, a letter in the libellant's custody, and which, it was alleged, was essential to the full understanding of the contract, should be ordered to be produced on motion of the defendant. The court said that if the whole contract had been in writing, and the letter in question contained the whole contract, the defendant would be entitled to have it produced, so, if, the whole contract being in writing, the letter was a part of the writing, if it appeared that the rest of the contract was either produced or within the control of the parties, and that there was no dispute as to what writings existed and were to be produced. But as the contract was to be proved partly by written and partly by parol

<sup>1</sup> *Spragg v. Corner*, 2 Cox, 109.

<sup>2</sup> *Princess of Wales v. Earl of Liverpool*, 1 Swanst. 114. In this case an affidavit was made that a note of hand which was in suit was believed not to be genuine, and it was necessary, in order that the answer might fully meet the case, that inspection of the note should be granted.

<sup>3</sup> See *Shepherd v. Morris*, 1 Beav. 175 ; *Milligan v. Mitchell*, 6 Simons, 186 ; *Penfold v. Nunn*, 5 Simons, 405 ; *Jones v. Lewis*, 4 Simons, 324, overruling the same case, 2 Simons & S. 242.

<sup>4</sup> See 3 Daniell's Ch. Practice, 2070.

evidence the court refused to require the libellant to produce the letter.<sup>1</sup>

In a recent case in England,<sup>2</sup> a motion was made by the claimants in a salvage cause, for leave to inspect certain letters in the possession of the owner of the salving vessel. The objection taken was that the documents in question were privileged communications, and consisted of correspondence between the owner and his agent, relating to the proceedings in the cause. Dr. Lushington said: "I have examined the cases at common law on this subject, but the whole question appears to me to be in a state of darkness and confusion. It would not be right for the court to order documents to be produced, of the contents of which it knows nothing. I direct that the documents in question be produced for my inspection, and I shall then consider whether I ought to grant the present application."

<sup>1</sup> The *Voyageur de la Mer*, 1 Sprague, 372. The reasons given for the decision are, that if the paper was produced, the defendants would obtain an advantage, as they would learn the extent of the knowledge or ignorance of the other parties as to the proofs of the contract, and without first answering as to their best knowledge and belief, could frame their answers to meet the disclosures on one particular point.

<sup>2</sup> The *Macgregor Laird*, Law Rep. 1 Adm. 307.

## CHAPTER VIII.

## OF THE ANSWER.

ACCORDING to established rules of practice in admiralty, before the defendant can be heard in his defence, or make use of any of his proofs, he must enter his appearance and contest the suit, either by filing exceptions or answering the libel. And if exceptions are taken and sustained, and the libel is amended by striking out the objectionable matter, the defendant should then answer the libel so amended. But, although until this is done, the defendant has no standing in court, yet if the neglect to file an answer was caused by ignorance, the court would undoubtedly allow an answer to be filed after the time established by its rules, and if, owing to the absence of the defendant, an answer could not be filed, the proctor for the defendant would be allowed to make any suggestions, and present any proper evidence as an *amicus curiæ*.<sup>1</sup>

The answer should correspond with the libel. The caption should state the court, the judge, the parties, and the kind of case, with legal accuracy and in appropriate language. It should then proceed to exhibit the defence, answering the libel, article by article, in the same order as numbered in the libel, and should answer in like manner each interrogatory propounded at the close of the libel.<sup>2</sup> What it admits, should be admitted unreservedly, if possible, and not by way of hypothesis; that is, not, if so and so, then so and so.<sup>3</sup> But where this is made necessary by the nature

<sup>1</sup> The David Pratt, Ware, 495.

<sup>2</sup> 27th Admiralty Rule. In *The Sch. Boston*, 1 Sumner, 328, 330, *Story, J.*, said: "The answer should accordingly reply to each article by a clear and exact admission or denial, or defence to the matter of it."

<sup>3</sup> *Treadwell v. Joseph*, 1 Sumner, 390. The charge was that the respondent did with force and violence, without rightful cause or justification, order the libellant to scrape down the masts of the ship for a long space of time, to wit, fourteen hours, the wind then blowing heavily. The answer was "that the scraping of the masts of a ship is a necessary duty," etc., "and that if the libellant was employed

of the case, as where certain facts are stated, of which the defendant cannot know whether they are true or false, but which he believes to be false, and has a perfect defence against them, if true, we can see no sufficient reason why he may not state his belief, and then his defence; and why, if he supposes that they may be true, he may not state this, and say, if true, then his defence is so and so. Such we should believe to be within the allowed practice of admiralty, for good cause shown, because there are here no rules like those of special pleading. Both the libel and the answer, and every other document in the case, must be as precise and definite as the party can make it, consistently with the actual facts of the case, or his actual knowledge, or his means of knowledge of these facts. But further than this we do not know that any rule or practice would carry the courts.

Every fact relied on in defence should be set forth with all due form of time, place, and circumstances.<sup>1</sup> And where a new clause in the shipping articles is relied on to repel a claim for wages, it must be specially pleaded.<sup>2</sup>

The defendant may rest upon mere denial of the plaintiff's allegations, or upon new matter of his own; and upon matters which he asserts to be positively true, or upon those which he declares to be true, according to his best knowledge. And every answer should be verified by the oath or solemn affirmation of the defendant,<sup>3</sup> except where the sum or value in dispute does not exceed

in that manner, it was a part of the ship's duty, which the libellant was bound to perform." It was held that a conditional answer of this nature was improper; that a party setting up the excuse or justification of any act must admit the existence of it. It was held also that the answer did not meet the gravamen of the charge, because it was only the duty of the crew to scrape the masts at proper times and seasons, and in a reasonable manner.

<sup>1</sup> *Orne v. Townsend*, 4 Mason, 541. In *Pettingill v. Dinsmore*, Daveis, 208, it was held that if the master desired to show, in defence to an action for wages, that the seaman was habitually careless, disobedient, or negligent, as a justification or mitigation of damages, he should set it forth in his answer. In *The Commander In Chief*, 1 Wallace, 43, the answer alleged that the vessel of the libellant lay in an improper manner and in an improper place, without setting forth in what manner she lay, or in what respect the manner was improper, and there was no definite description of the place where she lay or any reasons assigned why it was an improper anchorage. The opinion was expressed that the answer was too indefinite to constitute a valid defence, but the point was not determined.

<sup>2</sup> *Heard v. Rogers*, 1 Sprague, 556.

<sup>3</sup> 27th Admiralty Rule; *Gammell v. Skinner*, 2 Gallis. 45. In an early case in

fifty dollars exclusive of costs, unless the district court shall be of opinion that this is rendered necessary for the purposes of justice owing to peculiar circumstances in the case before the court.<sup>1</sup> The defendant may also in his answer object to respond to any allegation or interrogatory contained in the libel, which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offence.<sup>2</sup> And the defendant may in his answer require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may propound at the close of the answer, touching any matters charged in the libel, or touching any matter of defence set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution or punishment or forfeiture, as provided in the Thirty-First Rule. And if the libellant does not duly answer these interrogatories, the court may adjudge him to be in default, and dismiss the libel, or may compel his answer by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as it may in its discretion deem most fit to promote public justice.<sup>3</sup>

If either the libellant or the defendant is out of the country, or unable from sickness or other casualty to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may in its discretion in furtherance of the due administration of justice, dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.<sup>4</sup> The answer may be verified by the oath of the agent or proctor of the respondent, who must also make oath that

this country it was held that where the libel required the answer to be under oath, it required two witnesses to contradict the statements of the answer. *Teasdale v. Sloop Rambler*, Bee, 9. But the more correct view is, that this doctrine has no standing in admiralty. *Cushman v. Ryan*, 1 Story, 91, 102; *Sherwood v. Hall*, 3 Sumner, 127; *The Mary Paulina*, 1 Sprague, 45, 48; *Hutson v. Jordan*, Ware, 385; *Andrews v. Wall*, 3 How. 568, 572. And now that the answer is required to be under oath by an express rule of court, the oath of course can have no effect as evidence. *Eads v. The Steamboat H. D. Bacon*, 1 Newb. Adm. 274. It is also said in this last case that the answer under oath is of no more effect although it is responsive to interrogatories propounded.

<sup>1</sup> Additional Admiralty Rule, passed Dec. Term, 1850, 10 How. vi.

<sup>2</sup> 31st Admiralty Rule.

<sup>3</sup> 32d Admiralty Rule.

<sup>4</sup> 33d Admiralty Rule.

he has authority from the owner of the property, or was the lawful bailee thereof at the time of the arrest.

There is nothing in admiralty which answers precisely, in form, or in its technicalities to the plea in abatement,<sup>1</sup> or demurrer,<sup>2</sup> or exceptions of common-law courts. But so far as these are of substance they exist and must exist in the practice of all courts.<sup>3</sup> Exceptions to the libel are often filed under that name, and are provided for, as to the time and manner of filing, notice, answer, or confession, etc., by the rules of some of our courts.<sup>4</sup> They go usually to the jurisdiction of the court, or to the insufficiency of the libel, either in point of form or of substance; or to its being multifarious, as embracing distinct and independent causes of action, which cannot be united in the same proceeding.<sup>5</sup> But, with or without using the word "except," or "exception," the defendant in his answer may object to the libel that it is frivolous, unintelligible, impertinent, or otherwise improper, and if his objection be grounded in fact and reason, the court will order a further libel, or decree against the libellant generally, or make such other order or disposition of the case as justice may require.

So, the defendant may say in his answer, that the court has no jurisdiction of the case,<sup>6</sup> or that it has been judged and determined

<sup>1</sup> Defences which do not go to the merits of the case should, however, properly be made by a plea. They may be set up in the answer, but only by a distinct allegation. *The Platina*, U. S. D. C. Mass., 1858, 21 Law Rep. 397.

<sup>2</sup> But in *Manro v. Almeida*, 10 Wheat. 473, the case came before the court on a demurrer to a libel. Nothing, however, is said of a demurrer in the new admiralty rules.

<sup>3</sup> See *Knight v. The Attila*, Crabbe, 330.

<sup>4</sup> The 36th Rule of the Supreme Court provides that "exception may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal, and, if upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found."

<sup>5</sup> *The David Pratt*, Ware, 495. The case is said to have first come before the court on an exception to the libel in the nature of a demurrer. *Pratt v. Thomas*, Ware, 427.

<sup>6</sup> In *Teasdale v. Sloop Rambler*, Bee, 9, it was held that a plea to the jurisdiction must be by the party himself, and under oath. At the present day very little formality is necessary to bring the question of jurisdiction before the court. No provision is made for it in the Admiralty Rules, and no uniformity of practice exists. The doctrine of the Supreme Court has always been that consent cannot give jurisdiction, and if the want of jurisdiction is brought before the court



elsewhere,<sup>1</sup> by a court having jurisdiction ; or settled by compromise carried into effect, or that the court or the parties are

in any manner, either by the respondent, or is perceived by the court itself, the suit will be dismissed. Thus in *Cutler v. Rae*, 7 How. 729, the case came before the Supreme Court on an appeal on its merits, and the respondent made no objection to the jurisdiction, but the court ordered the question of jurisdiction to be argued, and afterwards dismissed the libel. See also *Gruner v. The United States*, 11 How. 163 ; *Montgomery v. Anderson*, 21 How. 386 ; *Ballance v. Forsyth*, 21 How. 389. In *Wilson v. Graham*, 4 Wash. C. C. 53, there was a plea to the jurisdiction and a demurrer to the plea. In *Vandewater v. Mills*, 19 How. 82, the objection to the jurisdiction was taken by an exception to the libel. In *Jackson v. Steamboat Magnolia*, 20 How. 296, the question of jurisdiction was raised on an agreed statement of facts. The objection is also very often taken in the answer. *Dean v. Angus, Bee*, 369 ; *Bogart v. The John Jay*, 17 How. 399 ; *The Genesee Chief v. Fitzhugh*, 12 How. 443 ; *Waring v. Clarke*, 5 How. 441. And it is sometimes presented by a motion to dismiss the libel. *The Bee, Ware*, 332 ; *Nelson v. Leland*, 22 How. 48. The question may also come before the Supreme Court by means of a writ of prohibition to the district court. See *ante*, p. 193.

In England, the usual way of bringing up the question has been by a protest to the jurisdiction, but it has been doubted whether this is the proper way of bringing the question before the court. *The Alexander*, 1 W. Rob. 288, 293.

<sup>1</sup> In *Taber v. Jenny*, 1 Sprague, 315, the answer set up an award of referees as a bar to the libel, but as it appeared that one of the referees had prejudged the cause, and the umpire had not heard the parties, but had made up his mind from statements made by the referees, the award was set aside. And when a plea of *res adjudicata* is made, the record of the former judgment should show that the very question, the precise title of which is the subject of litigation in the new action, was involved and decided in the former action, and not merely that it might have been. *The Vincennes*, U. S. D. C., Mass., *Ware, J.*, 21 Law Rep. 616. In *The Clarence*, 1 Spinks, 206, a verdict obtained at common law by the owners of the *Clarence* against the libellants, was pleaded but overruled. The case was then taken to the Privy Council, and at the hearing, Lord Justice *Knight Bruce* expressed his surprise that the matter could be again litigated, and intimated that if the judgment in the common-law court had been pleaded, it would have been a bar to the action. 1 Spinks, 209, note.

And in *Goodrich v. The City*, 5 Wallace, 566, it was held that where a matter is directly in issue and adjudged in a court of common law, that judgment may be set up as an estoppel in a court of admiralty. In this case, a judgment obtained by the defendant at common law was pleaded in bar of a suit in admiralty against the same defendant by the same plaintiff for the same cause of action. In *The John & Mary, Swabey*, Adm. 471, Dr. *Lushington* held that where a plaintiff sued in a cause of collision at common law and recovered a verdict, he was entitled afterwards, if the defendant proved insolvent, to sue the ship in admiralty, even though she had been transferred to a third party. So held also

wrongly named, or the action wrongly brought. All of these, and more, would be included in pleas of abatement; and being stated in the answer, the court will, if they are not denied, decree for defendant, or order an amendment of the libel, or take some other proper course. And if the answer admits all the facts stated in the libel, and then denies their sufficiency in law to make out the libellant's case, this, which is in substance a demurrer, would be judged of like any other answer, upon its substantial merits. It should be added, however, that while a want of jurisdiction arising from the subject-matter of the action, is fatal if brought to the notice of the court at any stage,<sup>1</sup> yet, if it be merely a personal exemption, the court are strongly disposed to regard an appearance, and answer as a waiver of this objection.<sup>2</sup>

A suit may be brought in a State court and discontinued, and a suit then brought on the same cause of action in admiralty.<sup>3</sup> The pendency of another action for the same cause, in a foreign court, is not a good plea in abatement, even at common law, and a State court is foreign in respect to a United States court for this purpose.<sup>4</sup> The plea should also show that the other court has

in *The Bengal*, Swabey, Adm. 468, in a suit for wages. In *Lang v. Holbrook*, Crabbe, 179, it was held that where a foreign court, not of admiralty, had decided a case on different principles from those recognized in this country, and leading to a different result from what would be here arrived at, though professedly deciding according to our law, a court of admiralty in this country was not bound by it, although the suit was by the same plaintiff against the same defendant and for the same cause of action. In *Sarchet v. The Sloop Davis*, Crabbe, 185, it was held that a judgment or dismissal of a libel in order to be a bar of a second suit, must have been ordered upon a hearing of the parties, or on the merits of the cause, and that a dismissal for want of appearance was not a conclusive judgment.

<sup>1</sup> See *Cutler v. Rae*, 7 How. 729, cited in the preceding note. The objection must, however, be taken before the case is remanded by the Supreme Court. *Washington Bridge Co. v. Stewart*, 3 How. 413; *Whyte v. Gibbes*, 20 How. 541.

<sup>2</sup> Thus a defective summons is cured by the appearance of the party. *Frankard v. Deacle*, 1 Hagg. Eccl. 169, 185. The admiralty court of one country is not bound, as we have seen, to exercise jurisdiction in suits between foreigners, but as it may do so, an objection to the jurisdiction should be made before entering an appearance, and answering to the merits of the case. *The Bee*, Ware, 332; *The Bilbao*, Lush. Adm. 149; See also *ante*, p. 406.

<sup>3</sup> *Bingham v. Wilkins*, Crabbe, 50.

<sup>4</sup> *White v. Whitman*, 1 Curtis, C. C. 494. See also *Wadleigh v. Veazie*, 3

jurisdiction of the suit, and it should be verified by affidavit, if any matter of fact is contained in it.<sup>1</sup>

If the defendant makes an error, and even a material one, in his answer, he may correct it by a supplemental answer, or by an amendment; and the adverse party will not be permitted to profit by it, if the error has been made innocently, and not as a trap.

When the libellant relies on new matter in avoidance of the defence set up in the answer, he should not put it in issue by a replication as formerly, but by an amended libel.<sup>2</sup>

It is said that there must be no double pleading in admiralty, and from what we have said, it is obvious that there need be none. But if there are distinct counts in the libel, properly stated, each of them should receive each its adequate and appropriate answer.

Sumner, 165; *Lyman v. Brown*, 2 Curtis, C. C. 559. In *The Lanarkshire*, 2 Spinks, 189, a suit *in rem* against the vessel was brought in England for seamen's wages. A plea that the men had commenced a suit against the master in Canada for the same cause of action was held a good plea.

<sup>1</sup> *White v. Whitman*, 1 Curtis, C. C. 494.

<sup>2</sup> 52d Admiralty Rule. See also *Taber v. Jenny*, 1 Sprague, 315; *Gladding v. Constant*, 1 Sprague, 73.

## CHAPTER IX.

## OF AMENDMENTS.

AMENDMENTS in matters of form may be made at any time, on motion to the court, as of course. And new counts may be filed, and amendments in matters of substance may be made upon motion at any time before the final decree, upon such terms as the court shall impose. "And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant."<sup>1</sup> Under this rule it has been held that if the amount

<sup>1</sup> 24th Admiralty Rule. This rule begins, "In all informations and libels in causes of admiralty and maritime jurisdiction, amendments, etc. This is the only rule relative to amendments, and we should suppose it would apply to amendments of answers as well as of libels. It may be well to state the former practice of the courts in respect to amendments. In the Supreme Court it has been held that the court will not allow an amendment which sets up a new subject of controversy. In the Superior Court of a county in Florida, sitting as an admiralty court, a claim had been made for salvage, and by a process *in rem*, seventy-two bales of cotton were attached, and condemned. The claimant appealed, but the libellant did not. In the next highest court, the court of appeals, the libellant had leave to amend by claiming fifty more bales. On appeal to the Supreme Court it was held that the claim for the fifty bales being a new subject of controversy, the court of appeals had no authority to allow the amendment. *Houseman v. Schooner North Carolina*, 15 Pet. 40. In *The Schooner Harmony*, 1 Gallis. 123, an amendment by inserting a new substantive offence was disallowed, on the sole ground that the statute of limitations had run against it. In *The Marianna Flora*, 11 Wheat. 1, an amendment as to a matter of substance was held to be correctly allowed in the circuit court on appeal from the district court. In *The Sch. Boston*, 1 Sumner, 328, 331, *Story, J.*, said: "It is the well-known usage of admiralty courts, even after an appeal, in fit cases, in their discretion, to allow either party to file new allegations and proofs; *non allegata allegare, et non probata probare.*" Facts, material to the defence having come to the knowledge of the claimants after an appeal, they were allowed to file a supplementary answer. See also *The Edward*, 1 Wheat. 261; *Schooner Adeline*, 9 Cranch, 244. In *Coffin v. Jenkins*, 3 Story, 108, decided the year before the new admiralty rules were adopted, the respondent moved in the circuit court for leave to file an amendment to his answer setting up a new point of defence, which had not been

demand in the inferior court is not sufficient to justify an appeal, the libellant cannot amend by adding a claim for interest.<sup>1</sup>

The application of the above rule to the amendment of an answer in the circuit court on appeal from the district, has been considered at length by a distinguished jurist, and we state his conclusions in his own words in our note.<sup>2</sup> It has been held that

taken in the district court, namely: that in the whale fisheries the master was not liable for lays, and that an action could be brought only against the owners or other agents in possession of the proceeds of the voyage. The amendment was not allowed, on the ground that the facts on which it rested were not new or newly discovered, and *Story, J.*, said: "The rule, in *appellatione a sententiâ definitiva licet non allegata allegare et non probata probare*, has many limitations, and requires many." In *Schooner Anne v. The United States*, 7 Cranch, 570, it was held that a libel could be amended after reversal for the want of substantial averments.

<sup>1</sup> *Udall v. Steamship Ohio*, 17 How. 17.

<sup>2</sup> *Lamb v. Parkman*, U. S. C. C. Mass., per *Curtis, J.*, 21 Law Rep. 589. After stating that the 24th Admiralty Rule applied to the circuit as well as to the district court, and that it was left to the sound discretion of the court in every case, or regulated by rules of practice, as to what amendments should be allowed, under what circumstances, and supported by what proofs they should be applied for, and in what form incorporated into the record, the learned judge said: "In this court there are no such written rules; but there are courses of decision in similar or analogous cases, which afford proper guides to the exercise of the discretion of the court. Some of these will be adverted to.

"The first is, that leave is given to amend a sworn answer in respect to any matter of substance, with great caution; and where the amendment consists in a denial of a fact previously admitted, or in the allegation of new facts amounting to a new defence, not exhibited in the court of the first instance, I must require the grounds for the amendment, and the reasons why it has become necessary, and why its necessity was not earlier known, to be clearly and satisfactorily shown by affidavit.

"Second. Each of the proposed changes in the answer should be exhibited separately, with apt references to the original answer, so that it can be seen how the original answer will be affected by each; and so that each, when allowed, can be incorporated into the original answer, when taken into a new draft as an amended answer.

"Third. The respondent will not be allowed to require formal proof of written documents, the authenticity of which was admitted by the original answer, without an affidavit denying the signatures, and explaining satisfactorily his former admission; nor to require the production of original papers, copies whereof were admitted by the original answer to be correct, and were used on the trial in the district court, without showing that such originals are in the possession or under the control of the libellant, and can be produced without causing delay, and that the production of such originals is material.

the form of an action cannot be allowed to be changed by an amendment. Thus, if a possessory suit is brought according to the rule of the Supreme Court, by a suit *in rem* and a monition to the parties, the libellant cannot amend so as to proceed *in personam* against the respondent for damages for a non-performance of contract.<sup>1</sup>

But while it is undoubtedly true that an appellate court has not this power,<sup>2</sup> it seems that the district court can make such an amendment, and that the appellate court can remand the case that such an amendment may be made. Thus it has been held that if a suit is improperly brought against a vessel *in rem*, and the owner *in personam*, the district court may allow an amendment striking out the name of the owner.<sup>3</sup> And where a libel was brought on the instance side of the court, which should have been brought in prize, the cause was remanded with directions to allow a libel in prize to be filed.<sup>4</sup> So if a libel is improperly brought in prize, the property will not be restored until an opportunity is given to file a libel on the instance side of the court, if the facts before the court show that such a libel could be maintained.<sup>5</sup>

If a party has lost his interest in a suit, his name may on motion be stricken from the record.<sup>6</sup>

It has been held that an appellee, who was the libellant in the district court, may in the circuit court amend his libel so as to

"Fourth. When an amendment seeks to withdraw an admission of a matter of fact, upon the ground that it was made because the respondent mistook the law, the court will permit it with great caution, and only under extraordinary circumstances, if ever. (See Daniell's, Ch. Pr. 913.)

"Fifth. The court will not allow a defendant to recast his entire answer, after he has discovered from the opinion of the district court, how it may successfully be done, so as to shift the burden of proof, or obtain, by skilful pleading, other legal advantages. (Calloway v. Dobson, 1 Brock. C. C. 122.) Amendments in sworn answers in the appellate court should introduce new substantive facts, previously unknown, or correct substantial mistakes in matters of fact, and cannot be allowed on account of any mere defect of skill in drafting the original answer, in consequence of which the respondent's case was not presented on the record in the best possible manner, or so as to secure to him all possible legal advantages."

<sup>1</sup> Kynoch v. The S. C. Ives, 1 Newb. Adm. 205.

<sup>2</sup> The John Jay, 3 Blatchf. C. C. 67.

<sup>3</sup> Newell v. Norton, 3 Wallace, 257.

<sup>4</sup> Jecker v. Montgomery, 13 How. 498.

<sup>5</sup> Alexander's Cotton, 2 Wallace, 404; United States v. Weed, 5 id. 62; The Watchful, 6 id. 91.

<sup>6</sup> The Falcon, 4 Blatchf. C. C. 367.

claim damages above the costs for the vexatious delay caused by the appeal.<sup>1</sup> We are unable, however, to see upon what principle of law this case proceeded.

Motions, petitions for adding or subtracting parties, for distribution, sale, or any incidental purposes, are received by the court in admiralty with great freedom, nor is it held any objection to an amendment that the rights of sureties may be affected, for they take upon themselves all the liabilities of their principals.<sup>2</sup>

The Rules of the court seldom interfere with proceedings of this nature, and it may be said that they are always admitted where substantial justice requires them. Thus a salvor, not joining with the rest, nor knowing his rights or claims, has been permitted to file a petition after the case had been decided, and a decree of distribution rendered, and distribution made; and he was then ordered a share out of the balance of proceeds which, not having been paid over to the claimant, remained in the custody of the court.<sup>3</sup> It should, however, be remarked that if a case in admiralty be taken by appeal to the Supreme Court, no new claim, nor libel, nor substantial amendment, can be admitted there, because the question it may raise cannot be examined and determined there as it might have been below. If it be a case of forfeiture, and the libel is so defective that a decree cannot be pronounced, the Supreme Court will send the case back to the court below, that it may be there amended. And generally, if an amendment be offered in the Supreme Court, the cause will be remanded to the circuit court, that the amendment may there be made.<sup>4</sup>

<sup>1</sup> *Weaver v. Thomson*, 1 Wallace, C. C. 348.

<sup>2</sup> See *ante*, p. 415, n. 3.

<sup>3</sup> *Ryan v. Ship Cato, Bee*, 241. The petitioner in this case found the vessel a derelict, took her in tow for two days, and finally anchored her nearly in sight of Charleston lighthouse, and then went to Charleston for assistance. When he returned, he found that the vessel had gone adrift, and was afterwards picked up by other persons. The petition also set forth that the petitioner had no knowledge that any suit had been commenced, no monition having issued, until the decree was made. It appeared that the agents of the underwriters and owners appeared and suggested that no monition was necessary, and none was issued, and that the property was sold at Edisto Island with their consent, instead of having been brought to Charleston. Under these circumstances, the court decreed \$200 from the owners' share of the proceeds, after the salvage had been decreed.

<sup>4</sup> *Brig Caroline v. The United States*, 7 Cranch, 496; *The Divina Pastora*, 4 Wheat. 52; *The Mary Ann*, 8 Wheat. 380. See *ante*, p. 431.

## CHAPTER X.

## OF SET-OFFS AND CROSS LIBELS.

If the respondent has a claim against the libellant, he can in many cases avail himself of it in his answer, as a set-off. The admiralty has no jurisdiction of an independent set-off,<sup>1</sup> and those usually allowed are where advances have been made upon the credit of the particular debt or demand for which the plaintiff sues, or which operate by way of diminished compensation for maritime services, on account of imperfect performance, misconduct, or negligence, or as a restitution in value for damages sustained in consequence of gross violations of the contract.<sup>2</sup> A loss arising from the gross neglect of a mariner may be set off in answer to a demand for wages.<sup>3</sup> If an action is brought for freight, it is held that damage done to the goods may be set off.<sup>4</sup> So freight is to be deducted, if the suit is for damage done to the goods.<sup>5</sup>

A set-off, founded on a contract, express or implied, is no defence to a libel in a cause of damage. But in a suit by a parent for the wrongful abduction of his minor son, where the damage is substantially the loss of service, the court is not absolutely pre-

<sup>1</sup> Willard v. Dorr, 8 Mason, 161, 171. In *The Lady Campbell*, 2 Hagg. Adm. 14, n., a suit was brought by a purser for his wages. The owners of the vessel claimed to set off a sum due for the passage of the purser's wife, but the court refused to allow it. In *Dexter v. Munroe*, 2 Sprague 39, a master and co-owner of a whaling vessel sued the other owners for his wages. It was agreed that in his capacity as owner he was indebted to the other owners, but it was not shown that this indebtedness was either by agreement or usage connected with the contract of hiring. Held, that the demand against him could not be set off against his claim for wages.

<sup>2</sup> Willard v. Dorr, 8 Mason, 161, 171. See also *The Mentor*, 4 Mason, 84.

<sup>3</sup> *The New Phoenix*, 2 Hagg. Adm. 420.

<sup>4</sup> *Bearse v. Ropes*, 1 Sprague, 331; *Snow v. Carruth*, 1 Sprague, 324; *Thatcher v. McCulloh*, Olcott, Adm. 365; *Bradstreet v. Heron*, Abbott, Adm. 209; *Zerega v. Poppe*, id. 397; *Kennedy v. Dodge*, U. S. D. C. New York, *Shipman, J.*, 1867.

<sup>5</sup> See cases *ante*. Vol. I. p. 207, n. 1.



cluded from considering, in determining the amount of damage, the advances of clothing and other necessities furnished the minor during the time.<sup>1</sup>

It would seem that if the set-off is more than the amount sued for, the respondent cannot have a decree for the balance,<sup>2</sup> nor can he afterwards bring a suit for the balance,<sup>3</sup> and on this account a cross libel is often filed, in which case the court, if there is no inexcusable delay in bringing the cross suit, will delay the execution in the original case till the other is heard.<sup>4</sup>

It has been said that where a cross libel is filed, process should be taken out and served in the usual way, and that an agreement of counsel that the answer of the respondents in the original suit should operate as a cross libel, is irregular, and ought not to receive countenance.<sup>5</sup>

<sup>1</sup> *The Platina*, U. S. D. C. Mass., 1858, 21 Law Rep. 397.

<sup>2</sup> *Snow v. Carruth*, 1 Sprague, 324; *Kennedy v. Dodge*, U. S. D. C. New York, 1867, *Shipman*, J.

<sup>3</sup> *Bearse v. Ropes*, 1 Sprague, 331; *Nichols v. Tremlett*, 1 Sprague, 361; *Kennedy v. Dodge*, U. S. D. C. New York, 1867, *Shipman*, J.

<sup>4</sup> *Nichols v. Tremlett*, 1 Sprague, 361. See *The North American*, Lush. Adm. 79.

<sup>5</sup> *Ward v. Chamberlain*, 21 How. 572.

## CHAPTER XI.

## OF THE TRIAL AND ITS INCIDENTS.

## SECTION I.

## OF THE TRIAL GENERALLY.

THERE is seldom much delay in bringing any suit in admiralty to a trial, beyond that which the actual circumstances of the case, as the distance of witnesses, or other facts of like kind, may require. There must be, by law, four stated terms of the courts in the year, at places and times prescribed by law, and there may be others at such other times and places as the respective judges shall think proper.<sup>1</sup> In our largest cities these courts are held very frequently, sometimes every week, and much of the business of the court is transacted by the judge, out of court, or at a special court held for the purpose, as the convenience of the parties, and the nature of the case, may require.

## SECTION II.

## OF EVIDENCE IN ADMIRALTY.

The trial very frequently proceeds upon the libel and answer. The answer, though under oath, does not require two witnesses to contradict it, as we have seen.<sup>2</sup> And we should say, without any doubt, that although the answers of the respondent to the interrogatories contained in the libel are evidence in the case,<sup>3</sup> yet they are not of more effect than any other evidence, and, if in his

<sup>1</sup> Act of 1789, c. 20, § 3, 1 U. S. Stats. at Large, 74.

<sup>2</sup> See *ante*, p. 423, n. 3.

<sup>3</sup> The *David Pratt*, Ware, 495. This was a suit *in personam*, and not *in rem*, as the title would indicate.

favor, should be received with caution, as coming from an interested party. It has been held that if the facts alleged in the libel are not denied in the answer, they are not, therefore, to be taken as confessed.<sup>1</sup> But as the Twenty-Seventh Admiralty Rule provides that the answer shall be full and explicit, we should suppose that the contrary would now be considered as the more correct rule.<sup>2</sup> A claim, though under oath, is not evidence.<sup>3</sup>

It may be doubtful whether a libel filed by a party to another suit can be given in evidence against him as his confession. But if he brought the suit as trustee and recovered, the *cestuis que trust* may put the whole record in evidence to show the recovery and the title on which it rested.<sup>4</sup>

The 34th section of the judiciary act<sup>5</sup> provides, "That the laws of the several States, except where the Constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply." This act does not, however, include cases in admiralty, and, until the passage of recent statutes, interested witnesses were excluded, except in cases of necessity.<sup>6</sup> And in a suit *in rem* against the vessel, to recover the value of the goods, the master is considered as an interested witness, but a release from some of the part-owners renders him competent.<sup>7</sup> So if the suit is *in personam*.<sup>8</sup> An objection to the interest of the master should be made at the hearing, and if not made until the argument, it is too late.<sup>9</sup>

In 1862, an act was passed providing that "The laws of the

<sup>1</sup> *Clarke v. Brig Dodge Healy*, 4 Wash. C. C. 651, 655. It was contended that the rule was the other way, but Mr. Justice *Washington* said: "This is a doctrine as novel as it is untenable."

<sup>2</sup> See *The Peerless*, in P. C., Lush. Adm. 103. This case also decides that conclusions drawn from certain regulations set up in the pleadings and not denied, were not thereby to be considered as admitted, they being deemed conclusions of law, and not of fact.

<sup>3</sup> *Sch. Thomas & Henry*, 1 Brock. C. C. 367.

<sup>4</sup> *Church v. Shelton*, 2 Curtis, C. C. 271.

<sup>5</sup> Act of 1789, c. 20, § 34, 1 U. S. Stats. at Large, 92.

<sup>6</sup> *The Independence*, 2 Curtis, C. C. 350; *The Wm. Jarvis*, 1 Sprague, 485.

<sup>7</sup> *The Peytona*, 2 Curtis, C. C. 21.

<sup>8</sup> *Swett v. Black*, 1 Sprague, 574.

<sup>9</sup> *Nelson v. Woodruff*, 1 Black, 156.

State in which the court shall be held shall be the rules of decision, as to the competency of witnesses in the courts of the United States, in trials at common law, in equity and admiralty.”<sup>1</sup> In 1864, it was provided, “That in the courts of the United States there shall be no exclusion of any witness on account of color, nor in civil actions, because he is a party to, or interested in, the issue tried.”<sup>2</sup> And in 1865,<sup>3</sup> this act was amended by a proviso, “That in actions by or against executors, administrators, or guardians, in which judgment may be rendered for or against them, neither party shall be allowed to testify against the other as to any transaction with, or statement by, the testator, intestate, or ward, unless called to testify thereto by the opposite party, or required to testify thereto by the court.”<sup>4</sup>

<sup>1</sup> Act of 1862, c. 189, 12 U. S. Stats. at Large, 588.

<sup>2</sup> Act of 1864, c. 210, § 3, 13 U. S. Stats. at Large, 351.

<sup>3</sup> Act of 1865, c. 113, 13 U. S. Stats. at Large, 533.

<sup>4</sup> The effect of the last clause of this statute was considered at length in the case of *Robinson v. Mandell*, U. S. C. C. Mass., Nov. 1868. An application was made to the court by the complainant in a suit in equity that she should be allowed to testify. *Clifford, J.*, said: “Such an application is doubtless addressed to the discretion of the court, but it is a legal discretion, and our opinion is that the court, in granting or refusing the application, ought to be governed as far as practicable by certain fixed rules, to be applied in all similar cases. Intrinsic difficulty, it is apprehended, may arise in every attempt to define such general rules, and perhaps it would be unwise to make any such attempt, except when an application is before the court calling for the decision of the court under the power conferred by the act of Congress. New as the provision is, and called upon as the court is for the first time to determine its true meaning, the court is not disposed to go one step beyond what the necessities of the present case require. Viewed as a whole, the several acts of Congress in relation to the competency of witnesses indicate an intent on the part of Congress so to legislate that the evidences of title to real estate and the rules of decision in all controversies affecting rights of property shall be the same in the federal courts as in the State courts of the same State and district, and the decisions of the Supreme Court throughout the period since its organization tend strongly to the same end. Impressed also with the conviction that that course of legislation and of decision has been highly beneficial, we are of the opinion that the court ought not to grant such an application under the provision in question in any case where the effect of granting it would be to adopt a rule of decision in the federal courts of the district different from that which the legislature of the State has prescribed for the government of the State courts in all similar cases. Where an executor or administrator is a party, the other party, under the law of the State, cannot be admitted to testify in his own favor unless the contract in issue was originally made with a person who is

Declarations of the master concerning the contract of affreightment are admissible in a suit against the owners, though they are not strictly part of the *res gestæ*.<sup>1</sup> But declarations of the other officers and of the crew are not admissible, and this has been so held in a case where the alleged declarations were made by the mate in regard to a collision, he being in charge of the deck at the time.<sup>2</sup>

Where suits by rival salvors are heard together, Dr. Lushington has held that the proper course of proceeding is for the witnesses, called by one set of salvors, to be cross-examined first on behalf of the other salvors, and then on behalf of the defendants.<sup>3</sup>

In England, it has long been the custom for the judge in cases of collision at the hearing of the cause to be assisted by two or more masters of the Trinity House, who give their opinion which vessel is in fault.<sup>4</sup> This opinion, though not binding on the court, is usually followed. In this country we have no such practice, generally;<sup>5</sup> but it was at one time customary in the Massachusetts

living and competent to testify, and this court decides that in such a case the court will not pass an order in a controversy respecting property requiring the living party to testify in his own favor to any transaction with or statement by the testator or testatrix, intestate or ward, as the case may be. Obviously the case at bar falls within that rule, and the decision of the court is that the complainant is not a competent witness in this case to testify to any transaction with, or statement by, the said testatrix, and that all such parts of her deposition as fall within that rule are rejected as inadmissible."

This case involved a large amount of property, and the learned judge carefully limits the rule to cases of that nature. How far the same rule would be adopted in admiralty is uncertain.

<sup>1</sup> The *Enterprise*, 2 Curtis, C. C. 317.

<sup>2</sup> The *Actæon*, 1 Spinks, 176. See also cases *ante*, Vol. I. p. 537.

<sup>3</sup> The *Philadelphia*, Brow. & L. Adm. 28.

<sup>4</sup> In *The Swanland*, 2 Spinks, 107, Dr. Lushington, addressing the Trinity Masters, said: "When a common-law judge has summed up the case to the jury, his duty is discharged; the jury give their verdict. But unfortunately for me, I have not only to state the evidence to you, but whatever decision or opinion you may give to me, to that opinion I must be an assenting party, in order to found a judicial decision thereon."

<sup>5</sup> It would seem that a practice similar to the English, obtains in Pennsylvania, for Judge Kane, in the case of *The Red Bank Co. v. The John W. Gandy*, 7 Am. Law Reg. 606, remarks: "The nautical gentlemen who did me the kindness to hear the evidence with me, are of opinion," etc. See also *The Hypodame*, 6 Wallace, 224. And in *The Brig Rival*, 1 Sprague, 128, experts were admitted by consent, and questions put to, and answers returned by, them.

district to submit the evidence to nautical men, and to take their opinion upon the facts in the case.<sup>1</sup> This practice was considered, however, as open to some objection, and in 1855 it was declared to be improper, and the more correct mode pointed out of taking the opinions of the experts upon a hypothetical case.<sup>2</sup>

But the practice of examining the expert in the most direct manner seems still to prevail. We think, however, that these cases are consistent with each other; and the rule may perhaps be stated thus: It is not proper to submit the evidence of other witnesses to experts, and then ask them for their opinion on the supposition that the facts stated are true; but if the subject in controversy is the cause of damage to a cargo, or any matter of a like nature, there can be no objection to asking experts who have examined the damaged cargo what in their opinion is the cause of the damage.<sup>3</sup>

In England, the opinions of nautical men in respect to a case of salvage have been rejected by the court.<sup>4</sup>

Affidavits are seldom admitted as proof. The court will not receive by an affidavit of a party any facts offered in bar to the action,<sup>5</sup> nor will it on an affidavit of any one decide questions

<sup>1</sup> In *Peele v. Merchants' Ins. Co.* 3 Mason, 27, 36, Mr. Justice Story said: "As to the question of the sufficiency of the repairs, that is so dependent upon practical skill in nautical affairs, that if the cause were to turn upon it, I should, according to the known course of the admiralty, refer it to experts to report upon the whole evidence, what in their judgment is the true posture of the case in this respect." See also *Lowry v. Steamboat Portland*, 1 Law Rep. 313.

<sup>2</sup> *The Clement*, 2 Curtis, C. C. 363. See also *Allen v. Mackay*, 1 Sprague, 219, 223. The case of *The Clement* was taken by appeal to the Supreme Court, and new depositions were taken, containing the opinions of the experts in the manner pointed out. But as the court were equally divided in opinion on the facts of the case, the case has never been reported, and we are unable to state whether the mode indicated received the sanction of the Supreme Court.

<sup>3</sup> *Morewood v. Enequist*, 23 How. 491. In *Ogden v. Parsons*, 23 How. 167, a charter-party stipulated that the vessel should receive a *full cargo*. It was held that the question what was a full cargo, under all the circumstances, and whether the ship could have been loaded to a greater depth than she was, consistent with safety, was a question which could be solved only by experienced ship-masters. The witnesses appear to have examined upon the precise question, and not upon a hypothetical case.

<sup>4</sup> *The No. 1 Spinks*, 184.

<sup>5</sup> *The Lord Hobart*, 2 Dods. 100.

relative to charges of a criminal character,<sup>1</sup> nor receive it to contradict,<sup>2</sup> or to fill out a deposition of the same person, nor in explanation and justification of the conduct of a party, which has appeared in evidence and has been commented on by counsel.<sup>3</sup>

A court of admiralty, it has been said, in England is much more liberal in the admission of evidence than a court of common law, on account of the nature of the causes tried, and the difficulty of getting witnesses, and the expense and delay of a rigid adherence to common law rules, and because the court may be considered more competent to weigh evidence than a jury.<sup>4</sup>

Probably the strict rule and the original practice permitted no oral testimony in admiralty; now, both in England<sup>5</sup> and in this country, it is not only constantly received, particularly in those cases, as actions for seamen's wages and the like, which require to be disposed of in the shortest time and at the least expense, but is required to be taken orally in the district court, except in certain specified cases.

Thus the Judiciary Act provides,<sup>6</sup> "That the mode of proof by oral testimony and examination of witnesses in open court shall be the same in all the courts of the United States, as well in the trial of causes in equity and of admiralty and maritime jurisdiction, as of actions at common law. And when the testimony of any person shall be necessary in any civil cause depending in any district in any court<sup>7</sup> of the United States, who shall live at a greater distance from the place of trial than one hundred miles,<sup>8</sup> or is bound on a

<sup>1</sup> *The Apollo*, 1 Hagg. Adm. 306, 315.

<sup>2</sup> *The Georgiana*, 1 Dods. 397, 399.

<sup>3</sup> *Wood v. Goodlake*, 2 Curteis, Eccl. 82, 97.

<sup>4</sup> *The Peerless*, Lush. Adm. 41.

<sup>5</sup> 3 & 4 Vict. c. 65, §§ 7, 8. See *The Swanland*, 2 Spinks, 107.

<sup>6</sup> Act of 1789, c. 20, § 30, 1 U. S. Stats. at Large, 88.

<sup>7</sup> This act does not apply to the Supreme Court of the United States. *The Argo*, 2 Wheat. 287. Nor to depositions taken under a rule of court. *Banert v. Day*, 3 Wash. C. C. 243; *Wilkinson v. Yale*, 6 McLean, 18.

<sup>8</sup> The witness must reside more than one hundred miles from the place of trial. *Curtis v. Central Railway*, 6 McLean, 401. It makes no difference whether his residence is in the district or without it. *Patapasco Ins. Co. v. Southgate*, 5 Pet. 604; *Allen v. Blunt*, 2 Woodb. & M. 136; *Russell v. Ashley*, Hempst. 546. The judge need not certify that the place where the deposition was taken was more than 100 miles from the place of trial. It is sufficient if the fact appears otherwise. *Voce v. Lawrence*, 4 McLean, 203. In *Ex parte Humphrey*, 2 Blatchf. C.

voyage to sea, or is about to go out of the United States,<sup>1</sup> or out of such district, and to a greater distance from the place of trial than as aforesaid, before the time of trial, or is ancient or very infirm, the deposition of such person may<sup>2</sup> be taken *de bene esse*<sup>3</sup> before any justice or judge of any of the courts of the United States, or before any chancellor, justice, or judge of a supreme or superior court, mayor or chief magistrate of a city,<sup>4</sup> or judge of a county court<sup>5</sup> or court of common pleas of any of the United States," (or any United States commissioner,<sup>6</sup> or the clerks of the circuit or dis-

C. 228, it was held that the statute did not apply to the case of a person who resided within 100 miles of the place of trial, but was more than that distance at the time of the service of the subpoena upon him, he being temporarily away from home.

<sup>1</sup> In *The Samuel*, 1 Wheat. 9, the reason assigned in the certificate was, "that the deponent is a seaman on board a gunboat of the United States, in the harbor of Newport, and liable to be ordered to some other place, and not to be able to attend the court at the time of its sitting." Held, insufficient.

<sup>2</sup> This does not preemptorily ordain that the testimony of witnesses, living more than 100 miles from the place of trial, shall be taken by deposition. It only permits such a course; and if such witnesses testify orally at the trial, the full cost of their travel and attendance is allowed in the costs. *Prouty v. Draper*, 2 Story, C. C. 199.

<sup>3</sup> A deposition cannot be taken under this statute, except by consent of parties while the court is in session, before which the cause is pending. *Allen v. Blunt*, 2 Woodb. & M. 122. The rule is the same where the notice is served so soon before the beginning of the term that the counsel could not be present when the court came in, if he should attend the deposition. *Bell v. Nimmon*, 4 McLean, 539.

<sup>4</sup> A deposition taken before a mayor, without a seal, is admissible, for *non constat* that he has a seal. *Price v. Morris*, 5 McLean, 4. It is otherwise if he usually certifies his official acts under seal. *Paul v. Lowry*, 2 Cranch, C. C. 628.

<sup>5</sup> In Mississippi, a judge of probate is "a judge of a county court," within the meaning of this act. *Fowler v. Merrill*, 11 How. 375, *nom. Merrill v. Dawson*, Hamps. 563. And it has been held that a judge of a county court can take depositions out of his county. *Voce v. Lawrence*, 4 McLean, 203. The judge of a city court cannot act under this section. *Foreman v. Holmead*, 5 Cranch, C. C. 162. Nor can a county commissioner. *Garey v. Union Bank*, 3 Cranch, C. C. 91.

<sup>6</sup> Act of 1817, c. 30, 3 U. S. Stats. at Large, 350, provides that commissioners "shall and may exercise all the powers that a justice or judge of any of the courts of the United States may exercise by virtue of the 30th section of the act entitled 'An act to establish the judicial courts of the United States.'" In *Hoyt v. Hammeikin*, 14 How. 350, an objection was taken to a deposition on the ground that it did not appear that the commissioner had been sworn. Held, that this objection was not sustainable. The court said: "The commissioner is an officer appointed by the courts of the United States, and his official acts are *prima facie* valid."



strict courts,<sup>1</sup> or notaries public,<sup>2</sup>) "not being of counsel or attorney to either of the parties,<sup>3</sup> or interested in the event of the cause, provided that a notification<sup>4</sup> from the magistrate<sup>5</sup> before whom the deposition is to be taken to the adverse party, to be present at the taking of the same, and to put interrogatories, if he think fit,<sup>6</sup> be first made out and served on the adverse party or his attorney as either may be nearest,<sup>7</sup> if either is within one hundred miles of the

<sup>1</sup> By act of 1853, c. 80, 10 U. S. Stats. at Large, 163, clerks are authorized "to take and certify affidavits and depositions in the same manner as commissioners."

<sup>2</sup> Act of 1854, c. 159, 10 U. S. Stats. at Large, 315, provides "that notaries public be and they are hereby authorized to take depositions and do such other acts in relation to evidence to be used in the courts of the United States, in the same manner and with the same effect, as commissioners to take acknowledgments of bail and affidavits may now lawfully take and do."

The authority of the magistrate need not be proved, otherwise than by his own certificate. *Ruggles v. Bucknor*, 1 Paine, C. C. 358; *Vasse v. Smith*, 2 Cranch, C. C. 31.

The certificate and seal of the notary are sufficient proof of his authority to act as such. *Dinsmore v. Maroney*, 4 Blatchf. C. C. 416.

<sup>3</sup> It seems not to be necessary for the magistrate to certify this. *Peyton v. Veitch*, 2 Cranch, C. C. 123.

<sup>4</sup> In *Harris v. Wall*, 7 How. 705, *Grier, J.*, said: "It would be reasonable, also, where notice is required to be given to the opposite party, that such notice should show on its face that the contingency has happened which confers jurisdiction on the magistrate, and gives a right to the party to have the deposition taken, so that the party on whom the notice is served may be able to judge whether it is necessary or proper that he should attend. The notice in this case states only that the witness is 'about to depart the State,' not that he is bound on a voyage to sea, or about to go out of the United States, or 100 miles from the place of trial." The point was not decided. In *Dinsmore v. Maroney*, 4 Blatchf. C. C. 416, a deposition was objected to on the ground that the requirements of the act in regard to previous notice had not been complied with; but as it appeared that a notice had in fact been served, and that counsel for the adverse party had attended and cross-examined the witness, the deposition was admitted.

<sup>5</sup> The magistrate must give the notice; and a notice given by the party is not enough. *Young v. Davidson*, 5 Cranch, C. C. 515.

<sup>6</sup> The notice need not state this. *Bussard v. Catalino*, 2 Cranch, C. C. 421.

<sup>7</sup> In *Carrington v. Stimson*, 1 Curtis, C. C. 437, the notice was served "by leaving a copy of the same on board the barque Weybopel lying at Constitution Wharf, in Boston," where the officer stated he "was informed the within-named Stimson lodged." *Curtis, J.*, said: "It must appear that every requisite has been complied with. One requisite is service of a notice on the adverse party, or his attorney, if either be within 100 miles. This must be construed to require personal service; no substituted service, by leaving the copy at his dwelling-house or

place of such caption,<sup>1</sup> allowing time for their attendance, after notified, not less than at the rate of one day, Sundays exclusive, for every twenty miles travel.<sup>2</sup> And in causes of admiralty and maritime jurisdiction, or other cases of seizure when a libel shall be filed, in which an adverse party is not named, and depositions of persons circumstanced as aforesaid shall be taken before a claim be put in, the like notification as aforesaid shall be given to the person having the agency or possession of the property libelled at the time of the capture or seizure of the same, if known to the libellant. And every person deposing as aforesaid shall be carefully examined and cautioned, and sworn or affirmed to testify the

usual place of abode, being authorized by the act. Consequently, the service in this case was insufficient to authorize the taking of the deposition." The case of *Merrill v. Dawson*, Hamps. 563, affirmed, *nom. Fowler v. Merrill*, 11 How. 375, is not opposed to this case, for the notice in *Merrill v. Dawson* was served under a rule of court allowing service by copy left at the dwelling-house. In *Dick v. Runnels*, 5 How. 9, there is a *dictum* of *McLean, J.*, that a notice left at the place of residence is sufficient.

The notice should contain the name of the witness whose deposition is to be taken. *Carrington v. Stimson*, 1 Curtis, C. C. 437. Notice directed to the party himself may be served on his attorney. *Barrell v. Limington*, 4 Cranch, C. C. 70.

<sup>1</sup> The distance that the adverse party and his attorney resided from the place of taking the deposition, so as to supersede the necessity of giving notice, may be shown by the certificate of the magistrate. *Merrill v. Dawson*, Hamps. 563. Or proved by evidence *aliunde*. *Voce v. Lawrence*, 4 McLean, 203; *Travers v. Bell*, 2 Cranch, C. C. 160. In *Dick v. Runnels*, 5 How. 7, the certificate stated that no notice was given the adverse party or his counsel because neither of them lived within 100 miles of the place of caption to the deposition. It was contended that the certificate should have stated that neither of them was within 100 miles of the place, at the time of taking the deposition. Held, that the certificate was sufficient. In *The Argo*, 1 Gallis. 314, which was an information for a violation of the non-intercourse law, the District Attorney offered in evidence depositions taken in New York without notice. The court said: "Though depositions thus taken have been usually received, there are certainly great objections to the practice; and the court have heretofore intimated a resolution to require notice to be given in all cases, where there is an attorney of record." It was also held that in all cases where the United States is a party, and there is an attorney of the United States residing within 100 miles of the place of caption, notice must be given to him.

<sup>2</sup> In *Bussard v. Catalino*, 2 Cranch, C. C. 421, the certificate omitted the word "not" before the words "less than at the rate of one day," etc. Held, no defect.

whole truth,<sup>1</sup> and shall subscribe<sup>2</sup> the testimony by him or her given after the same shall be reduced to writing, which shall be done only by the magistrate taking the deposition, or by the deponent in his presence.<sup>3</sup> And the depositions so taken shall be retained by such magistrate until he deliver the same with his

<sup>1</sup> The magistrate need not certify that the witness was sworn to testify the whole truth "in the matter in controversy." *Bussard v. Catalino*, 2 Cranch, C. C. 421. In *Brown v. Piatt*, 2 Cranch, C. C. 253, a certificate that the witness was duly examined and solemnly affirmed, was held sufficient, although it did not state that the witness was cautioned. In *Moore v. Nelson*, 3 McLean, 383, a certificate that the "witness was sworn in pursuance of the act of Congress, and carefully examined and sworn," was held sufficient. In *Pentleton v. Forbes*, 1 Cranch, C. C. 507, a certificate that the deposition was subscribed and sworn to by the deponent, was held to be insufficient. In *Garrett v. Woodward*, 2 Cranch, C. C. 190, a certificate that previous to the taking of the deposition the deponent was by the magistrate carefully examined, cautioned, and affirmed to testify the truth concerning all the matters touching which he should be questioned, was held insufficient. In *Rainer v. Haynes*, Hems. 689, a certificate that the witness was "carefully examined and cautioned and duly sworn to testify the truth in regard to the matters in controversy," was held to be insufficient. It should have stated that he was sworn to testify the whole truth. In *Luther v. Sch. Merritt Hunt*, Newb. Adm. 4, a certificate was held insufficient for omitting to state that the witness had been cautioned.

<sup>2</sup> In *Voce v. Lawrence*, 4 McLean, 203, the magistrate certified that the deposition was reduced to writing by him. Held, that it was not necessary to certify that the witness signed, because the signing was a part of the deposition, and the certificate was, therefore, equivalent to saying that it was signed. In *Centre v. Keene*, 2 Cranch, C. C. 198, the magistrate did not certify that the deponent subscribed it in his presence, but that he subscribed it after it was reduced to writing by the magistrate. Held, sufficient.

<sup>3</sup> In *Bell v. Morrison*, 1 Pet. 356, the certificate stated that the deponent, "after being carefully examined and cautioned and sworn to testify the whole truth, did subscribe the foregoing and annexed deposition, after the same was reduced to writing, by him in his own proper hand." Held, insufficient, because it did not clearly appear that the deposition was reduced to writing in the magistrate's presence. So held in *Edmonson v. Barrell*, 2 Cranch, C. C. 228, where the certificate was, "he maketh oath to the deposition above written, and subscribes the same in my presence, the said deposition being first reduced to writing by the deponent." And in *Marstin v. McRea*, Hems. 688, a certificate that the deposition "was reduced to writing under my direction," was held insufficient. See also *Vase v. Smith*, 2 Cranch, C. C. 31; *United States v. Smith*, 4 Day, 126; *Bussard v. Catalino*, 2 Cranch, C. C. 421; *Rainer v. Haynes*, Hems. 689. In *Thorpe v. Simmons*, 2 Cranch, C. C. 195, a certificate that "form" instead of "the same" "was reduced to writing" was held insufficient.

own hand into the court for which they are taken, or shall, together with a certificate of the reasons as aforesaid of their being taken,<sup>1</sup> and of the notice if any given to the adverse party,<sup>2</sup> be by him the said magistrate sealed up and directed to such court,<sup>3</sup> and remain under his seal until opened in court.”<sup>4</sup>

<sup>1</sup> How far strict accuracy is necessary in stating the title of the case is, perhaps, somewhat uncertain. In *Peyton v. Veitch*, 2 Cranch, C. C. 123, at the trial by jury, the report says: “Mr. Taylor, for the plaintiff, objected to the defendants’ depositions that they did not appear to have been taken in this cause, the names of three of the defendants having been omitted in the caption.” The court *nem. con.* rejected them on that ground. See also *Waskern v. Diamond*, Hems. 701; *Allen v. Blunt*, 2 Woodb. & M. 137. In *Voce v. Lawrence*, 4 McLean, 203, the title of the deposition stated the names correctly. In the body of the deposition the words “Anderson the above plaintiff,” were used instead of the right name of the plaintiff. Held, no uncertainty. See also *Merrill v. Dawson*, Hems. 563; *Buckingham v. Burgess*, 3 McLean, 368.

In *Centre v. Keene*, 2 Cranch, C. C. 198, the title of the case was Robert Centre, surviving partner of the late firms of Ripley, Centre, & Co. and Ripley & Centre v. Newton Keene. The caption stated that the deposition was to be used in an action in which Robert Centre & Co. were plaintiffs. Held, insufficient.

In *Harris v. Wall*, 7 How. 705, *Grier, J.*, said: “The authority or jurisdiction conferred on the magistrate by this act is special, and confined within certain limits or conditions, and the facts calling for the exercise of it should appear upon the face of the instrument, and not be left to parol proof. The act of Congress requires them to be certified by the magistrate. The magistrate did not certify that the adverse party was served with notice or the reasons for taking the deposition. Held, that the certificate was insufficient. See also *Jones v. Knowles*, 1 Cranch, C. C. 523; *Jones v. Neale*, Mart. N. C. 81. “The certificate may be controverted by parol proof, especially in regard to the facts stated, of which the magistrate is not supposed to have official knowledge.” Per *McLean, J.*, in *Dick v. Runnels*, 5 How. 9.

<sup>2</sup> See *Harris v. Wall*, 7 How. 693. The certificate should show a notice given to the adverse party or the reason why no notice was given. *Pendleton v. Forbes*, 1 Cranch, C. C. 507. If the certificate states facts which made it unnecessary to give notice, it need not state that these facts were the reason why no notice was given. *Dinsmore v. Maroney*, 4 Blatchf. C. C. 416.

<sup>3</sup> In *Shanwiker v. Reading*, 4 McLean, 240, a deposition was rejected because the certificate did not state that the magistrate retained the deposition until sealed up and directed to the court. See also *Jones v. Neale*, Mart. N. C. 81. A direction on the envelope to the “judges” of the court, instead of to “the

<sup>4</sup> In *Beale v. Thompson*, 8 Cranch, 70, the deposition was opened by the clerk out of court, through a mistake. Held to be a fatal objection. So, where the deposition was opened by an officer of the government before it came into the possession of the clerk. *United States v. Price*, 2 Wash. C. C. 356.

This section also provides that unless it appears on the trial of any cause that the witnesses are then dead or gone out of the United States, or to a greater distance than one hundred miles<sup>1</sup> from the place where the court is sitting, or that by reason of age,<sup>2</sup> sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court, such depositions shall not be admitted or used in the cause.<sup>3</sup>

Since depositions may be taken *ex parte* under this statute, if the adverse party and his attorney live more than one hundred miles from the place of taking the deposition, such testimony when so taken is viewed with suspicion,<sup>4</sup> and it is the practice in

court," is not objectionable. *Thorp v. Orr*, 2 Cranch, C. C. 335. This case also decides that a certificate of the magistrate that he intended to seal up the deposition is not objectionable. In *Nelson v. Woodruff*, 1 Black, 156, at the hearing in the district court the deposition of a witness was objected to on the ground, 1. That no preliminary proof had been made of the witness' materiality. 2. That it was not sealed up; and, 3. That no notice was given of its being filed. The commissioner who took the deposition was the clerk of the court, and the proctor of the adverse party knew that the deposition had been taken. *Betts, J.*, for these reasons overruled the objections. On appeal the Supreme Court said: "We also concur entirely with the view taken by our Brother *Betts*, of the district court, upon the objections made to the admission of the deposition."

<sup>1</sup> If the witness resides within one hundred miles he must be subpoenaed, and it must be shown that he is unable to come. *Banert v. Day*, 3 Wash. C. C. 243.

<sup>2</sup> In *Banert v. Day*, 3 Wash. C. C. 243, the witness was sixty-five years old; but as it was not shown that he was unable to come his deposition was rejected.

<sup>3</sup> *The Samuel*, 1 Wheat. 9; *Rutherford v. Geddes*, 4 Wallace, 220. It is no objection to reading the deposition of a witness, who lives in another State, more than one hundred miles from the place of trial, that he had been in the city during the session of the court, if the fact was not known to the party. *Pettibone v. Derringer*, 4 Wash. C. C. 215. If the witness, at the time of taking the deposition, lives more than one hundred miles from the place of trial, the presumption is that he is still there at the time of the trial, and the party intending to use his deposition is not first obliged to show that he is then more than one hundred miles from the place of trial. The burden of showing that he is within the distance is on the adverse party. In all the other cases, the party intending to use the deposition must first show that the disability still continues. *Patapeco Ins. Co. v. Southgate*, 5 Pet. 617.

<sup>4</sup> In *Walsh v. Rogers*, 13 How. 283, 286, the court, per *Grier, J.*, said: "While we are on this subject, it will not be improper to remark, that when the act of Congress of 1789 was passed, permitting *ex parte* depositions, without notice, to be taken, where the witness resides more than a hundred miles from the place of trial, such a provision may have been necessary. It then required nearly as much

some courts to allow a continuance for the purpose of enabling the adverse party to obtain the full evidence of the witness.<sup>1</sup>

The authority conferred by the statute is special, and in derogation of common law, and must therefore be construed strictly.<sup>2</sup>

Depositions taken in another suit concerning the same subject-matter are not admissible in evidence, where the party against whom they are offered was not a party to the suit in which they were taken, nor privy to such party, and therefore could not cross-examine the witnesses.<sup>3</sup>

Depositions may also be taken by a *dedimus potestatem*, under a commission issuing from the court,<sup>4</sup> and when so taken, are not to be considered as taken *de bene*, but absolute, and may be used without reference to the accessibility of the witness.<sup>5</sup>

The commissioners are agents of the court, and not of the parties or of either of them, and if, therefore, the cross-interrogatories are not put, the defendant may object to the deposition.<sup>6</sup>

time, labor, and expense to travel one hundred miles, as it does now to travel one thousand. Now, testimony may be taken and returned from California, or any part of Europe, on commission, in two or three months, and in any part of the States east of the Rocky Mountains in two or three weeks. There is now seldom any necessity for having recourse to this mode of taking testimony. Besides, it is contrary to the course of common law; and, except in cases of mere formal proof (such as the signature or execution of an instrument of writing), or of some isolated fact (such as demand of a bill, or notice to an indorser), testimony thus taken is liable to great abuse. At best it is calculated to elicit only such a partial statement of the truth as may have the effect of entire falsehood. The person who prepares the witness and examines him can generally have just so much or so little of the truth, or such a version of it, as will suit his case. In closely contested cases of fact, testimony thus obtained must always be unsatisfactory and liable to suspicion, especially if the party has had time and opportunity to take it in the regular way. This provision of the act of Congress should never be resorted to unless in circumstances of absolute necessity, or in the excepted cases we have just mentioned."

<sup>1</sup> *Allen v. Blunt*, 2 Woodb. & M. 138.

<sup>2</sup> *Bell v. Morrison*, 1 Pet. 351, 355; *Harris v. Wall*, 7 How. 693.

<sup>3</sup> *Rutherford v. Geddes*, 4 Wallace, 220.

<sup>4</sup> The 30th section of the act of 1789, c. 20, 1 U. S. Stats. at Large, 88, 90, contains the following proviso: "Provided, that nothing herein shall be construed to prevent any court of the United States from granting a *dedimus potestatem* to take depositions according to common usage when it may be necessary to prevent a failure or delay of justice."

<sup>5</sup> *Sergeant v. Biddle*, 4 Wheat. 508.

<sup>6</sup> *Gilpins v. Consequa*, Pet. C. C. 85

If the commission issues to four persons jointly, it is not enough that it is taken by three of the four;<sup>1</sup> nor was the deposition admitted when the commissioners named by the party objecting, attended in part to the execution of the commission, and then withdrew.<sup>2</sup> Where the commissioners in a foreign country were prohibited from acting by the law of government of that country, and a judge took it, according to the terms of the commission in other respects, it was admitted.<sup>3</sup> If the commission be to two, jointly and severally, either may execute it, and each of them may take the deposition of the other.<sup>4</sup> If one not named in the commission join in taking it, it cannot be received.<sup>5</sup> And if the commission direct that the deposition shall be taken in a certain place, it cannot be taken in any other.<sup>6</sup> If the magistrate do not deliver the deposition taken by him into court, personally, he must send it sealed and directed to the court.<sup>7</sup> But if the return of the commissioners be sent in an envelope which is sealed by them, no other sealing upon the deposition or return is requisite.<sup>8</sup> If the certificate of the magistrate sets forth all the required facts, it will entitle the deposition to be read without further proof.<sup>9</sup> And any officer taking it, is *prima facie* presumed to be what he purports and is described to be on the face of the deposition.<sup>10</sup> Nor is it a good objection that the commissioners are Dutchmen, who do not say that they acted by a sworn interpreter, although the deposition is in English.<sup>11</sup> It has been doubted whether it is necessary that the deposition should be signed by the witness,<sup>12</sup> but this is certainly usual. Each interrogatory must be put, and must be answered; and the omission is fatal, although in answer to the gen-

<sup>1</sup> Guppy v. Brown, 4 Dall. 410; Armstrong v. Brown, 1 Wash. C. C. 43.

<sup>2</sup> This is so stated in Coxe's Digest, 159, and the case of Muns v. Dupont, 2 Wash. C. C. 463, 2 Browne, App. 42, is cited. But in neither report of this case does the point appear to have arisen.

<sup>3</sup> Winthrop v. Union Ins. Co. 2 Wash. C. C. 7.

<sup>4</sup> Lonsdale v. Brown, 3 Wash. C. C. 404.

<sup>5</sup> Willings v. Consequa, Pet. C. C. 301.

<sup>6</sup> Bondereau v. Montgomery, U. S. C. C. Penn., 1821, Coxe's Digest, 244.

<sup>7</sup> Jones v. Neale, Mart. N. C. 81.

<sup>8</sup> Grant v. Naylor, 4 Cranch, 224, 228.

<sup>9</sup> Bell v. Morrison, 1 Pet. 351.

<sup>10</sup> Ruggles v. Bucknor, 1 Paine, C. C. 358.

<sup>11</sup> Gilpins v. Consequa, Pet. C. C. 85.

<sup>12</sup> Ketland v. Bissett, 1 Wash. C. C. 144.

eral interrogatories, the witness says he knows nothing more that is material to either party.<sup>1</sup> The rule applies to all the cross-interrogatories<sup>2</sup> and to the general interrogatory.<sup>3</sup> But if an interrogatory is to be put, or to be answered, only if such a statement has been made, or such an event occurred, and this contingency has not happened, then the question need not be put or be answered.<sup>4</sup> If the interrogatories are substantially put, though not in the precise form in which they are propounded by the parties, and if it appear that they are answered by the witnesses, it is sufficient.<sup>5</sup> So if they are substantially though not formally answered.<sup>6</sup>

If a witness is asked if a certain affidavit be true, and replies in the affirmative, this does not introduce the affidavit.<sup>7</sup> Objections to the competency of a witness should be made when a deposition is taken; if not, they are considered as waived, unless they were at that time unknown, without fault of the objecting party.<sup>8</sup> And if a deposition has once been read in evidence, without objection, it cannot be afterwards objected to as irregularly taken.<sup>9</sup> But this, or an express waiver, imparts to the deposition no new character, or force; thus, if it be taken *de bene esse*, an express waiver does not make it a deposition in chief or absolute.<sup>10</sup>

When the time limited in an order for taking evidence had expired, it was enlarged, the court being satisfied that justice required it, there being new evidence discovered.<sup>11</sup> But where rules are themselves of great importance, they will not be disregarded, even if the individual case would seem to justify an excep-

<sup>1</sup> Ketland v. Bissett, 1 Wash. C. C. 144.

<sup>2</sup> Gilpins v. Consequa, Pet. C. C. 85. It was also held in this case that it was sufficient, if the cross-interrogatories were put to each witness after all had answered the direct interrogatories, although the more proper course would have been to have asked each witness the cross-interrogatories immediately after he had answered the direct.

<sup>3</sup> Richardson v. Golden, 3 Wash. C. C. 109; Dodge v. Israel, 4 Wash. C. C. 323.

<sup>4</sup> Bell v. Davidson, 3 Wash. C. C. 328.

<sup>5</sup> Winthrop v. Union Ins. Co. 2 Wash. C. C. 7.

<sup>6</sup> Nelson v. United States, Pet. C. C. 235.

<sup>7</sup> Richardson v. Golden, 3 Wash. C. C. 109.

<sup>8</sup> United States v. 1 Case of Hair Pencils, 1 Paine, C. C. 400.

<sup>9</sup> Evans v. Hettich, 7 Wheat. 453.

<sup>10</sup> The Sch. Thomas & Henry v. United States, 1 Brock. C. C. 367.

<sup>11</sup> The Sch. Ruby, 5 Mason, 451.



tion; so, where, in the circuit court (but not in admiralty), a *witness* being of extreme old age, it was requested that a friend might attend him before the commissioners, the request was denied.<sup>1</sup>

The act of 1792<sup>2</sup> provides that "the forms and modes of proceeding in suits of equity, and of admiralty jurisdiction, shall be according to the principles, rules, and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law, except so far as may have been provided for by the act to establish the judicial courts of the United States; subject, however, to such alterations and additions as the said courts respectively shall in their discretion deem expedient, or to such regulations as the Supreme Court of the United States shall think proper, from time to time, by rule to prescribe to any circuit or district court, concerning the same."

In some countries the government refuses to recognize the authority of a foreign court to send a *dedimus potestatem* to take evidence within their jurisdiction. In such a case, in countries governed by the civil law, it was usual to send letters rogatory, or letters *sub mutua vicissitudine*, as they are sometimes called, from a clause which they usually contained, to a foreign court, informing it that a certain claim was pending, in which the testimony of certain witnesses who resided within its jurisdiction was required, and requesting it to take their depositions, or cause them to be taken in due course and form of law, for the furtherance of justice, and with an offer, on the part of the court making the request, to do the like for the other in a similar case. This practice does not obtain in our common-law courts, though it was formerly in use in England; but it has been adopted in at least one case in the United States courts,<sup>3</sup> and our admiralty courts would undoubtedly employ it if necessary.

<sup>1</sup> *Cunningham v. Otis*, 1 Gallis. 166.

<sup>2</sup> C. 36, § 2, 1 U. S. Stats. at Large, 276.

<sup>3</sup> *Nelson v. The United States*, Pet. C. C. 235. This was an information for a breach of the non-importation law. A commission had issued from the district court to take the evidence of certain persons in Havana, but the authorities there prevented its execution. Letters rogatory were then issued by the circuit court in the following form:—

In 1827 an act was passed providing that whenever a commission should be issued by any court of the United States for taking the testimony of a witness at any place within the United States or the Territories thereof, the clerk of the district or territory in which such place might be should issue a subpoena to the witness. The judge of the district or territory may also order the clerk in proper cases to issue a subpoena *duces tecum*, and he may punish a witness for refusing to obey either of these subpoenas.<sup>1</sup>

The question has been much discussed by Mr. Conkling as to the proper mode of taking testimony in the circuit court, and his opinion is that it should be oral, except in cases where a deposition *de bene esse* is allowed, or where it is taken under a *dedimus potestatem* "to prevent a failure or delay of justice." The act of 1803, c. 40,<sup>2</sup> provided that upon an appeal from the circuit court to the Supreme, "a transcript of the libel, bill, answer, depositions, and all other proceedings of what kind soever in the cause, shall be transmitted to the said Supreme Court." Congress had previously authorized the taking of evidence in equity suits in the circuit court by deposition, at the request of either party, except in those States in which testimony in chancery is not taken by deposition.<sup>3</sup> In 1833,

"United States,  
District of Pennsylvania. } Sct.

"The President of the United States to any judge or tribunal, having jurisdiction of civil causes at Havana, greeting:—

"Whereas, a certain suit is pending before us in which John D. Nelson, Henry Abbott, and Joseph E. Tatem, are the claimants of the schooner *Perseverance* and cargo, and the United States of America are the defendants; and it has been suggested to us that there are witnesses residing within your jurisdiction, without whose testimony justice cannot completely be done between the said parties. We therefore request you, that, in furtherance of justice, you will, by the proper and usual process of your court, cause such witness or witnesses, as shall be named or pointed out to you by the said parties, or either of them, to appear before you or some competent person, by you for that purpose to be appointed and authorized, at a precise time and place, by you to be fixed, and there to answer on their oaths and affirmations, to the several interrogatories hereunto annexed; and that you will cause their depositions to be committed to writing, and returned to us under cover, duly closed and sealed up together with these presents. And we shall be ready and willing to do the same for you in a similar case when required. Witness," etc. See also *United States v. Holmes*, 12 Law Rep. 382; and Act of 1863, c. 95, 12 U. S. Stats. at Large, 769, which we give in the Appendix.

<sup>1</sup> Act of 1827, c. 4, 4 U. S. Stats. at Large, 197.

<sup>2</sup> 2 U. S. Stats. at Large, 244.

<sup>3</sup> Act of 1802, c. 31, § 25, 2 U. S. Stats. at Large, 166.

Mr. Justice Story said: "I beg here to repeat what was stated at the bar at the time, but seems not to have been generally understood in practice, that since the act of the 3d of March, 1803, c. 93, (c. 40), in admiralty causes, as well as in equity causes, all the evidence originally taken in the circuit court, in cases capable of appeal, must be transmitted to the Supreme Court, which cannot be unless the same is reduced to writing; and no new supplementary evidence can be received in the Supreme Court, except in admiralty and prize causes, which rule presupposes that all the old evidence is already in the record."<sup>1</sup> Mr. Conkling, on the other hand, contends that the 30th section of the judiciary act of 1789, enjoining the examination of witnesses in open court, applies equally to cases in the circuit as in the district courts, and cites the remainder of the section, which, he says, precludes the possibility of a doubt of the fact. This section is as follows: "In the trial of any cause of admiralty or maritime jurisdiction in a district court, the decree in which may be appealed from, if either party shall suggest to, and satisfy the court that probably it will not be in his power to produce the witnesses there testifying before the circuit court, should an appeal be had, and shall move that their testimony be taken down in writing, it shall be so done by the clerk of the court. And if an appeal be had, such testimony may be used on the trial of the same, if it shall appear to the satisfaction of the court which shall try the appeal that the witnesses are then dead or gone out of the United States, or to a greater distance than as aforesaid from the place where the court is sitting, or that, by reason of age, sickness, bodily infirmity, or imprisonment, they are unable to travel and appear at court, but not otherwise."<sup>2</sup> But we hardly think this meets the objection of Mr. Justice Story. The question is not so much the import of the act of 1789 as it is the effect of the act of 1803. The section above cited by Mr. Conkling makes no provisions for reducing the evidence in the circuit court to writing, which must be in that state in order that the act of 1803 may be complied with.<sup>3</sup> In

<sup>1</sup> The Sch. Boston, 1 Sumner, 328, 332.

<sup>2</sup> 1 U. S. Stats. at Large, 89. The 6th Rule of the circuit court for the Northern District of New York, allows a copy of the notes taken by the judge to be evidence, and further extends the rights given by the statute cited in the preceding note.

<sup>3</sup> In *Conn v. Penn*, 5 Wheat. 424, the question arose as to the proper manner

1846, a rule was adopted by the circuit court for the first circuit, which provides that "in all causes in admiralty the testimony shall be in writing, unless for special cause shown the court shall allow witnesses to be examined orally upon the stand."

It is now provided by the Fifty-Second Admiralty Rule, that further proof<sup>1</sup> taken in a circuit court upon an admiralty appeal shall be by deposition taken before a commissioner, or before some officer authorized to take depositions by the thirtieth section of the act of Congress of 1789, upon an oral examination and cross-examination, unless the court or one of the judges shall allow upon motion a commission to issue upon written interrogatories and cross-interrogatories. And the rule also provides that when oral evidence is taken down by the clerk of the district court, and is transmitted to the circuit court, it may be there used in evidence, saving to either party the right to take the deposition of the party if he should so elect.

The act of 1803, c. 40,<sup>2</sup> provides that on the hearing of an appeal in the Supreme Court no new evidence shall be received, except in admiralty and prize causes.<sup>3</sup> The manner of taking such evidence is pointed out by the twelfth general rule of the Supreme Court, which we give in our note.<sup>4</sup>

of taking evidence in an equity suit in the Supreme Court. The extent to which the act of 1803 overrules the preceding acts was not decided, the court stating that they felt considerable doubts on the subject, but it was held that all the testimony on which the judge in the court below founded his opinion must be before the court and appear on the record, and the evidence having been taken orally in the court below, the cause was remanded for further proceedings.

<sup>1</sup> 13 How. vi. In *The Enterprise*, 2 Curtis, C. C. 317, 321, Mr. Justice Curtis said: "In the suit *in rem*, numerous technical objections were taken to the admissibility of the depositions sent up to this court from the district court. I consider these depositions to have been taken as further proof under the rule of the Supreme Court on that subject."

<sup>2</sup> 2 U. S. Stats. at Large, 244.

<sup>3</sup> See *Hawthorne v. The United States*, 7 Cranch, 107; *The Brig James Wells v. The United States*, 7 Cranch, 22.

<sup>4</sup> "1. In all cases where further proof is ordered by the court, the depositions which shall be taken, shall be by a commission to be issued from this court, or from any circuit court of the United States. 2. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this court, the evidence by testimony of witnesses shall be taken under a commission to be issued from this court, or from any circuit court of the United States, under the direction of any judge thereof; and no such commission shall issue but upon interrogatories

to be filed by the party applying for the commission, and notice to the opposite party or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross-interrogatories within twenty days from the service of such notice: Provided, however, that nothing in this rule shall prevent any party from giving oral testimony in open court in cases where, by law, it is admissible." 21 How. ix.

This rule is the same as the old 25th and 27th General Rules. In the Massachusetts district the practice for many years prior to this rule was, for the clerk to issue a commission as a matter of course, on written interrogatories and cross-interrogatories being filed.

## CHAPTER XII.

## OF COMMISSIONERS AND REFEREES.

IN cases where the court shall deem it expedient or necessary for the purposes of justice, it may refer any matters arising in the progress of the suit to one or more commissioners, to be appointed by the court, to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises, which are usually given to or exercised by masters in chancery, in references to them, including the power to administer oaths to, and examine, the parties and witnesses touching the premises.<sup>1</sup> The report of the commissioners will not be disturbed, unless it is shown to be affirmatively in the wrong.<sup>2</sup> And parties excepting to the report should state, with reasonable precision, the grounds of their exception, with the mention of such particulars as will enable the court to ascertain what the basis of the exception is.<sup>3</sup>

<sup>1</sup> 44th Admiralty Rule. In *Shaw v. Collyer*, 4 Blatchf. C. C. 370, the district court heard sufficient evidence to show that the libellant had been in the employ of the respondent as master of a vessel, and that the principal question was the amount due. The case was then referred to a commissioner to take proofs as to the nature, extent, and value of the service, and as to the payments made, or other deductions to be allowed, if any, and to report thereon. Held, that this was unobjectionable.

<sup>2</sup> *Taber v. Jenny*, 1 Sprague, 815. In *The Ship Potomac*, 2 Black, 581, a claim against a vessel for repairs was sent to a master to take an account. The report of the master found the amount due, but stated no account. General exceptions were taken to it, as "that it was for an amount far exceeding any amount of work performed," etc. Held, that if the respondent wished to contest any of the specific charges he should have had the report referred back to the master to state an account; and that it was not enough for the appellant merely to raise a doubt on conflicting testimony; that the judgment of the court below might possibly be erroneous, but that the judgment must be assumed to be correct till the contrary is made to appear.

<sup>3</sup> Thus in *The Commander In Chief*, 1 Wallace, 43, the following exceptions were overruled for the reasons given: 1st. That the commissioner allowed improper and immaterial evidence to be introduced by the libellants. Overruled,

Where a cause is sent to a commissioner to assess damages, his report has not the effect of a verdict, but the court may modify it, or wholly reject it.<sup>1</sup>

If a cause is sent to a master, and he refuses to examine a certain witness, the party offering the witness should present to the court a written statement on oath, as to the particulars which the witness was offered to prove, that the court may compare it with what has been already proved by the other witnesses of the party, to enable the court to determine whether it was independent, or only cumulative proof.<sup>2</sup>

If a party is dissatisfied with a commissioner's report in respect to the matter of damages, he should file appropriate exceptions in the district court; otherwise objections to the amount will not be afterwards entertained.<sup>3</sup> An objection to the regularity of a commissioner's report should be made by motion, and not by an exception to the report.<sup>4</sup>

An award of a referee will not be recommitted because the counsel for the libellants omitted to call the attention of the court to a matter which might have influenced the referee to increase the damages, if his attention had been called to it.<sup>5</sup> The principal grounds for setting aside an award are fraud, collusion, and mistake.<sup>5</sup> An award, made in pursuance of a rule of court directing a referee to determine the amount due and the question of costs, is sufficiently certain if it states the amount due, and that the libellants are entitled to costs, without stating the amount of the costs.<sup>5</sup>

In a salvage case, where an award was made out of court, and the salvors, being dissatisfied with the amount, libelled the vessel because it was not accompanied by any report of the evidence objected to, and there was, therefore, no means of determining whether it was proper or improper. 2d. That the commissioner had no evidence to justify his finding. Overruled, because there was no report of the facts. 3d. That witnesses were admitted to testify as to the value of the vessel who were not competent, and whose evidence should have been rejected. Overruled, because the names of the witnesses were not given, and it was not stated why they were incompetent, nor what their testimony was, nor the ground why it should have been rejected.

<sup>1</sup> *Sturgis v. Clough*, 1 Wallace, 269.

<sup>2</sup> *The Steamer New Philadelphia*, 1 Black, 62, 75.

<sup>3</sup> *The Vanderbilt*, 6 Wallace, 230.

<sup>4</sup> *The Columbus*, Abbott, Adm. 37.

<sup>5</sup> *The Liverpool Packet*, 2 Sprague, 37.

in admiralty, Dr. Lushington said it was a grossly factious proceeding, and condemned the salvors in costs and damages for the detention of the vessel.<sup>1</sup>

<sup>1</sup> The Nautilus, Swabey, Adm. 105.



## CHAPTER XIII.

## OF PRIZE CAUSES.

It is necessary to speak of the rules and practice of admiralty peculiar to prize causes.<sup>1</sup> In 1864<sup>2</sup> an act of Congress was passed which provides very fully for all matters likely to arise in prize causes. It is the duty of the commanding officer of the vessel making the capture, to secure the documents of the ship and cargo, including the log-book, and all other documents, letters, and papers found on board, to make an inventory of the same, and to seal them up, and send them with the inventory to the court in which proceedings are to be had, with a written statement that they are all the papers found, and in the condition in which they were found, and explaining the absence of any documents or papers, or any change in their condition.

He is required to send to the court as witnesses, the master,<sup>3</sup> one or more of the other officers, — the supercargo, purser, or agent of the prize, — and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He is also to send the prize, with the documents, papers, and witnesses, under charge of a competent prize-master and prize-crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient in view of the interests of probable claimants, as well as of the captors. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had thereon, and an appraisement made by

<sup>1</sup> See the elaborate essays of Mr. Justice *Story* on this subject in 1 *Wheat. App.* 494, and 2 *Wheat. App.* 1.

<sup>2</sup> Act of 1864, c. 174, 13 U. S. Stats. at Large, 306. This act we give in the Appendix.

<sup>3</sup> See *The Julia*, 2 *Sprague*, 164.

persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had ; and such property, unless appropriated for the use of the government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the assistant treasurer of the United States most accessible to said court, and subject to its order in the cause.<sup>1</sup>

If any vessel of the United States claims to share in the prize, either as having made the capture, or as having been within signal distance of the vessel making the capture, the commanding officer of such vessel shall make out a written statement of his claim, with the grounds on which it is rested, the principal facts tending to show what vessels made the capture, and what vessels were within signal distance of those making the capture, with reasonable particularity, as to times, distances, localities, and signals made, seen, or answered ; and such statement of claim shall be signed by him and sent to the court in which proceedings shall be had, and shall be filed in the cause.<sup>2</sup>

It is the duty of the prize master to make his way diligently to the selected port, and there immediately deliver to a prize commissioner the documents and papers, and the inventory thereof, and make affidavit that they are the same, and in the same condition as delivered to him, or explaining any absence or change of condition therein, and that the prize property is in the same condition as delivered to him, or explaining any loss or damage thereto ; and he must report to the district attorney, and give to him all the information in his possession respecting the prize and her capture ; and also deliver over to the custody of the marshal the persons sent as witnesses, and retain the prize in his custody until it shall be taken therefrom by process from the prize court.<sup>3</sup>

The attorney of the United States for the district is required immediately to file a libel against such prize property, and to forthwith obtain a warrant from the court directing the marshal to take it into his custody, and to proceed diligently to obtain a condemnation and distribution thereof, and to see that the proper preparatory evidence is taken by the prize commissioners, and that the prize commissioners also take the depositions *de bene esse*

<sup>1</sup> Act of 1864, c. 174, § 1.

<sup>2</sup> *Ibid.* § 2.

<sup>3</sup> *Ibid.* § 3.

of the prize crew and other transient persons cognizant of any facts bearing on condemnation or distribution. It is also the duty of the district attorney to represent the interests of the United States in all prize causes, and not to act as separate counsel for the captors on any private retainer or compensation from them, unless in a question between the claimants and the captors on a demand for damages. The district attorney is also required to examine all fees, costs, and expenses, sought to be charged on the prize fund, and protect the interest of the captors and of the United States. The district attorneys of all districts in which any prize causes are or may be pending, are required as often as once in three months to send to the Secretary of the Navy a statement of the condition of all prize causes pending in their districts, in such form and embracing such particulars as the Secretary of the Navy shall require.<sup>1</sup>

The district court may appoint three prize commissioners who shall receive from the prize master the documents and papers, and the inventory thereof, administer the affidavit of the prize master before spoken of, and take the evidence of the witnesses sent in the prize, separate from each other,<sup>2</sup> on standing interrogatories.<sup>3</sup>

<sup>1</sup> Act of 1864, c. 174, § 4.

<sup>2</sup> The witnesses are examined apart from each other, and successively, before the depositions are closed and sent to the court, for after this is done, the commissioners cannot take further evidence without a special order. *The Speculation*, 2 Rob. Adm. 293. And in one case where, two days after the vessel came into port, a person representing himself to be the supercargo went before the commissioners and offered papers in his possession, in behalf of the claimants, the commissioners refused to examine him, and were sustained by the court. *The Anna*, 1 Rob. Adm. 331.

<sup>3</sup> The English standing interrogatories may be found in 1 Rob. Adm. 381. *The American* in 2 Wheat. App. 81. In the Southern District of New York, there are distinct prize rules which may be found in Dunlap's Adm. Practice, 2d ed. 368. In 1863, elaborate interrogatories in prize were prepared in the Massachusetts District. 2 Sprague, 305. Formerly only those persons on board the prize, and others introduced by special order of the court, were examined. *The Eliza & Katy*, 6 Rob. Adm. 185, 189; *The Henrick & Maria*, 4 Rob. Adm. 43, 57; *The Haabet*, 6 Rob. Adm. 54. This examination should take place without delay, and the commissioners must see that the inquiries are properly put and answered with all the minuteness of detail that is necessary to procure a full, explicit, and substantial answer to every question. *The Ann Green*, 1 Gallia. 274, 284.

The witnesses are not to see the interrogatories, documents, or papers, or to consult with counsel,<sup>1</sup> or with any persons interested, without special authority from the court; and the witnesses who have the rights of neutrals shall be discharged as soon as practicable. The prize commissioners shall also take depositions *de bene esse* of the prize crew and others, at the request of the district attorney, on interrogatories prescribed by the court. They shall also, as soon as any prize property comes within the district for adjudication, examine the same, and make an inventory thereof, founded on an actual examination, and report to the court whether any part of it is in a condition requiring immediate sale for the interests of all parties, and notify the district attorney thereof; and if it be necessary to the examination or making of the inventory that the cargo be unladen, they shall apply to the court for an order to the marshal to unlade the same, and shall, from time to time, report to the court anything relating to the condition of the property, or its custody or disposal, which may require any action by the court, but the custody of the property shall be only in the marshal. They shall also seasonably return into court, sealed and secured from inspection,<sup>2</sup> the documents and papers which shall come to their hands, duly scheduled and numbered, and the other preparatory evidence, and the evidence taken *de bene esse*, and their own inventory of the prize property; and if the captured vessel, or any of its cargo or stores, are such that, in their judgment, they may be useful to the government in war, they shall report the same to the Secretary of the Navy.<sup>3</sup>

It is the duty of the marshal to keep safely all prize property under warrant from the court; to report to the court any cargo or other property that he thinks requires to be unladen and stored, or to be sold; to insure prize property, if, in his judgment, it is for the interest of all concerned; to keep in his custody all persons found

<sup>1</sup> No counsel are permitted to be present; but it is the duty of the commissioners to superintend the regularity of the proceeding, and to protect the witnesses from surprise or misrepresentation, and after the deposition is taken, each sheet is read over to the witness, and separately signed by him. The *Apollo*, 5 Rob. Adm. 286.

<sup>2</sup> Documents found on board a prize are not to be inspected by any person before the claims have been filed and the evidence in preparatory completed and publication ordered. The *Cuba*, 2 Sprague, 168.

<sup>3</sup> Act of 1864, c. 174, §§ 5, 6.

on board a prize and sent in as witnesses, until they are released by the prize commissioners or the court. If a sale of property is ordered, he is to sell the same in the manner required by the court, and collect the purchase-money, and forthwith deposit the gross proceeds of the sales with the assistant treasurer of the United States nearest the place of sale, subject to the order of the court in the particular cause; and each marshal is to forward to the Secretary of the Navy, whenever and as often as he may require it, a full statement of the condition of each prize and of the disposition made thereof.<sup>1</sup>

Whenever any prize property is condemned, or at any stage of the proceedings is found by the court to be perishing, perishable, or liable to deteriorate or depreciate, or whenever the costs of keeping the same are disproportionate to its value, it is the duty of the court to order a sale thereof; and whenever, after the return day on the libel, all the parties in interest who have appeared in the cause shall agree thereto, the court is authorized to make such order, and no appeal shall operate to prevent the making or execution of such order. It is the duty of the Secretary of the Navy to employ an auctioneer or auctioneers of known skill in the branch of business to which any sale pertains, to make the sale; but the sale is to be conducted under the supervision of the marshal, and the collecting and depositing of the gross proceeds to be by the auctioneer or his agent. Before any sale the marshal must cause full catalogues and schedules to be prepared and circulated, and a copy of each must be returned by the marshal to the court in each cause. The marshal must cause all sales to be advertised fully and conspicuously in newspapers ordered by the court, and by posters, and, at least five days before the sale, serve notice thereof upon the naval prize commissioner, and the goods are to be open to inspection at least three days before the sale.<sup>2</sup>

If a decree of condemnation is rendered, it is then the duty of the court to determine what vessels are entitled to participate in the prize, and whether the prize was of superior, equal, or inferior force to the vessels making the capture.<sup>3</sup> For this purpose testi-

<sup>1</sup> Act of 1864, c. 174, § 7.

<sup>2</sup> Ibid. § 8.

<sup>3</sup> In *The Atlanta*, 3 Wallace, 425, 2 Sprague, 251, it was held that in deter-

mony is taken at as early a stage in the cause as possible, and it may be sworn to before any judge or commissioner of the courts of the United States, consul or commercial agent of the United States, or notary public, or any officer of the navy highest in rank, reasonably accessible to the deponent. The decree of the court must recite the amount of the gross proceeds of the prize subject to the order of the court, and the amount deducted therefrom for costs and expenses, and the amount remaining for distribution, and whether the whole of such residue is to go to the captors, or one half to the captors, and one half to the United States.<sup>1</sup>

The net proceeds of all property condemned as prize, when the prize was of superior or equal force to the vessel or vessels making the capture, is decreed to the captors; and when of inferior force, one half is decreed to the United States and the other half to the captors. In case of prizes taken by privateers and letters-of-marque, the whole is decreed to the captors, unless it is otherwise provided in the commissions issued to such vessels.

All vessels of the navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid if required, share in the prize;<sup>2</sup> and in case of vessels not of the navy, none shall be mining the capturing force it was proper to consider not only the vessel which led in the attack, and which fired the only shots that were fired, but also any other vessel which, by having diverted the fire of the vessel forced to surrender, by an obviously great force, by its position, conduct, and plain purpose at once to come into the engagement, and to inflict perhaps complete destruction, may have hastened the surrender.

<sup>1</sup> Act of 1864, c. 174, § 9.

<sup>2</sup> The previous acts of Congress on this subject are Act of 1779, c. 24, 1 U. S. Stats. at Large, 715; that of 1800, c. 33, 2 U. S. Stats. at Large, 52; and that of 1862, c. 204, 12 U. S. Stats. at Large, 606. In the first two acts it was provided that all ships in sight at the time of capture should share in the prize. The act of 1862 provided that, "When one or more vessels of the navy shall be within signal distance of another making a prize, all shall share in the prize." In *The Cherokee*, 2 Sprague, 235, the meaning of these statutes and the English decisions in regard to actual and constructive captors was considered at length; and it was held that co-operation in a blockade did not constitute the blockading vessels joint captors, if the prize was captured out of signal distance of the vessel making the capture, although the chase was begun in sight of several of the vessels. This was affirmed in *The St. John*, 2 Sprague, 266. The meaning of the term "signal distance" was considered at length in the case of *The Ella & Anna*, 2 Sprague, 267, and it was held that where a prize is made by one vessel alone,

entitled to share except the vessel or vessels making the capture, in which terms shall be included vessels present at the capture and rendering actual assistance in the capture.<sup>1</sup>

All prize money adjudged to the captors is distributed in the following proportions, namely:—

First. To the commanding officer of a fleet or squadron, one twentieth part of all prize money awarded to any vessel or vessels under his immediate command.

Second. To the commanding officer of a division of a fleet or squadron, on duty under the orders of the commander-in-chief of such fleet or squadron, a sum equal to one fiftieth part of any prize money awarded to a vessel of such division for a capture made while under his command, the said fiftieth part to be deducted from the moiety due to the United States, if there be such moiety, otherwise from the amount awarded to the captors: *Provided*, That such fiftieth part shall not be in addition to any share which may be due to the commander of the division, and which he may elect to receive, as commander of a single ship making or assisting in the capture.

Third. To the fleet-captain, one hundredth part of all prize money awarded to any vessel or vessels of the fleet or squadron in which he is serving, except in a case where the capture is made by the vessel on board of which he is serving at the time of such capture; and in such case he shall share, in proportion to his pay, with the other officers and men on board such vessel, as is hereinafter provided.

Fourth. To the commander of a single ship, one tenth part of all the prize money awarded to the ship under his command, if such ship at the time of the capture was under the command of

other vessels who claim to participate in the proceeds solely on the ground that they were within signal distance, have the burden of proof upon them to establish all the facts necessary to sustain their claim; and that to give such vessels a right to participate in the proceeds, it must appear that they were within a distance at which signals could have been seen in the state of atmosphere and other circumstances existing at the time; and that it was not enough to place them within a distance at which signals might have been seen under other circumstances. See also *The Aries*, 2 Sprague, 262; *The St. John*, id. 266; *The Steamer Anglia*, Blatchf. Prize Cases, 566.

<sup>1</sup> See *The Santa Brigada*, 3 Rob. Adm. 52; *La Flore*, 5 Rob. Adm. 268; *The Bellona*, Edw. Adm. 63.

the commanding officer of a fleet or squadron, or a division, and three twentieths if his ship was acting independently of such superior officer.

Fifth. After the foregoing deductions, the residue shall be distributed and proportioned among all others doing duty on board (including the fleet-captain), and borne upon the books of the ship, in proportion to their respective rates of pay in the service.

No commanding officer of a fleet or squadron is entitled to receive any share of prizes captured by any vessel not under his command, nor of such prizes as may have been captured by any vessels intended to be placed under his command, before they have acted under his orders. Nor shall the commanding officer of a fleet or squadron, leaving the station where he had command, have any share in the prizes taken by ships left on such station after he has gone out of the limits of his said command, nor after he has transferred his command to his successor. No officer or other person who has been temporarily absent on duty from a vessel on the books of which he continued to be borne, while so absent, is deprived, in consequence of such absence, of any prize money to which he would otherwise be entitled. And he continues to share in the captures of the vessels to which he is attached until regularly discharged therefrom.<sup>1</sup>

A bounty is paid by the United States for each person on board any ship or vessel-of-war belonging to an enemy at the commencement of an engagement, which is sunk or otherwise destroyed in such engagement by any vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it is to be estimated according to the complement allowed to vessels of its class in the navy of the United States; and there is paid as bounty to the captors of any vessel-of-war captured from an enemy, which they may be instructed to destroy, or which is immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who was on

<sup>1</sup> Act of 1864, c. 174, § 10.



board at the time of such capture. All ransom money, salvage, bounty, or proceeds of condemned property, accruing or awarded to any vessel of the navy, is distributed and paid to the officers and men entitled thereto in the same manner as prize money, under the direction of the Secretary of the Navy.<sup>1</sup>

Every assignment of prize or bounty money, or wages, due to persons enlisted in the naval service, and all powers of attorney, or other authority to draw, receipt for, or transfer the same, are void, unless the same be attested by the captain, or other commanding officer, and the paymaster; and in case of any assignment of wages, the same must specify the precise time when they commence. But the commanding officer of every vessel is required to discourage his crew from selling any part of their prize money or wages, and never to attest any power of attorney until he is satisfied that the same is not granted in consideration of money given for the purchase of prize money or wages.<sup>2</sup>

Appeals from the district courts of the United States in prize causes are made directly to the Supreme Court, and must be made within thirty days of the rendering of the decree appealed from, unless the court shall previously have extended the time, for cause shown in the particular case, and the Supreme Court is always open for the entry of such appeals. Such appeals may be claimed whenever the amount in controversy exceeds two thousand dollars, and, in other cases, on the certificate of the district judge that the adjudication involves a question of general importance. Notwithstanding such appeal, the district court may make and execute all necessary orders for the custody and disposal of the prize property; and in case of appeal from a decree of condemnation, may still proceed to make a decree of distribution so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein.

In any case of appeal or transfer the court below, or the appellate court, may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof.<sup>3</sup>

All costs and all expenses incident to the bringing in, custody,

<sup>1</sup> Act of 1864, c. 174, § 11.

<sup>2</sup> Ibid. § 12.

<sup>3</sup> Ibid. § 13. This section also provides for appeals then pending in the circuit court.

preservation, insurance, sale, or other disposal of prize property, when allowed by the court, are a charge upon the same, and to be paid therefrom, unless the court decrees restitution free from such charge. No payments are made from any prize fund, except upon the order of the court. All charges for work and labor, materials furnished, or money paid, must be supported by affidavit or vouchers. The court may, at any time, order the payment, from the deposit made with the assistant treasurer in the cause, of any costs or charges accrued and allowed. When the cause is finally disposed of, the court makes its order or orders on the assistant treasurer to pay the costs and charges allowed and unpaid; and in case the final decree is for restitution, or in case there is no money subject to the order of the court in the cause, any costs or charges allowed by the court, and not paid by the claimants, are a charge upon, and to be paid out of, the fund for defraying the expenses of suits in which the United States is a party or interested.<sup>1</sup>

The court may require any party, at any stage of the cause, and on claiming an appeal, to give security for costs.<sup>2</sup>

The net amount decreed for distribution to the United States, or to vessels of the navy, is ordered by the court to be paid into the treasury of the United States, to be distributed according to the decree of the court. The Treasury Department credits the Navy Department with each amount received to be distributed to vessels of the navy; and the persons entitled to share therein are severally credited, in their accounts with the Navy Department, with the amounts to which they are respectively entitled. In case of vessels not of the navy, the distribution is made by the court to the several parties entitled thereto, and the amounts decreed to them are divided between the owners and the ship's company, according to any written agreement between them, and in the absence of such agreement, one half to the owners and one half to the ship's company, according to their respective rates of pay on board; and the court may appoint a commissioner to make such distribution, subject to the control of the court, who must make due return of his doings, with proof of actual payments by him, and who receives no other compensation, directly or indirectly, than such as shall be allowed him by the court. In case of vessels not of the navy, but

<sup>1</sup> Act of 1864, c. 174, § 14.

<sup>2</sup> Ibid. § 15.

controlled by any department of the government, the whole amount decreed to the captors is divided among the ship's company.<sup>1</sup>

The clerk of each district court must render to the Secretary of the Treasury and the Secretary of the Navy a semi-annual statement, of all the sums allowed by the court and ordered to be paid, within the previous half-year, to the district attorney and prize commissioners for services, and to marshals for fees and commissions; and he is required in all prize causes in the district, for the purpose of the final decree of distribution, to ascertain and keep an account of the amount deposited with the assistant treasurer, subject to the order of the court in each prize cause, and the amounts ordered to be paid therefrom as costs and charges, and the residue for distribution; and to send copies of all final decrees of distribution to the Secretary of the Treasury and the Secretary of the Navy; and to draw the orders of the court for the payment of all costs and allowances, and for the distribution of the residue. For the said services, he is entitled to receive the sum of twenty-five dollars in each prize cause, which is in full for the above-described services.<sup>2</sup>

The marshal is allowed his actual and necessary expenses, for the custody, care, preservation, insurance, sale, or other disposal of the prize property, and for executing any order of the court respecting the same, and also a commission of one quarter of one per centum on vessels, and of one half of one per centum on all other prize property, calculated on the gross proceeds of each sale; and if, after he has had any prize property in his custody, and has actually performed labor and incurred responsibility for the care and preservation thereof, the same is taken by the United States for its own use without a sale, or if it is delivered on stipulation to the claimants, he is, in case the same shall be condemned, entitled to one half the above commissions on the amount deposited by the United States to the order of the courts, or collected upon the stipulation.<sup>3</sup> No charges of the marshal for expenses or disbursements are allowed, except upon his oath that the same have been actually and necessarily incurred for the purpose stated.<sup>4</sup>

<sup>1</sup> Act of 1864, c. 174, § 16.

<sup>2</sup> Ibid. § 17.

<sup>3</sup> Such compensation was not allowed previously to the passage of this act. *The Victory*, 2 Sprague, 226.

<sup>4</sup> Act of 1864, c. 174, § 18.

Neither the marshal nor the clerk are permitted to retain for their official services, of every kind, excepting those in prize causes, more than the maximum compensation allowed to be retained by him by the third section of the act of the twenty-sixth of February, eighteen hundred and fifty-three; and the additional compensation which either of said officers is permitted to retain for all services, of every kind, in prize causes, is not to exceed one half the maximum compensation allowed to them, respectively, by the aforesaid act.<sup>1</sup>

The district attorney and prize commissioners, except the naval officer, are allowed a just and suitable compensation for their respective services in each prize cause, to be adjusted and determined by the court, and to be paid as costs in the cause.<sup>2</sup>

Each district attorney and prize commissioner, except the naval officer, is required to render to the Secretary of the Interior an annual account of all sums he has received for all services in prize causes within the previous year; and the district attorney is allowed to retain therefrom a sum not exceeding three thousand dollars for each year, in addition to the maximum compensation allowed to be retained by him by the third section of the act of the twenty-sixth February, eighteen hundred and fifty-three, or in addition to any salary he may receive in lieu of such maximum compensation; and each such prize commissioner is allowed to retain a sum not exceeding three thousand dollars for each year, which shall be in full for all his official services in prize causes; and any excess over those respective amounts is to be paid by the officer receiving the same into the treasury of the United States, and is to be credited to the fund for paying naval pensions.<sup>3</sup>

The auctioneers employed to make sales of prize property are entitled to receive commissions by a scale to be established by the Secretary of the Navy, not to exceed, in any case, one half of one per centum on any sum exceeding ten thousand dollars on vessels, nor one per centum on said sum of other prize property, which is in full for their expenses, as well as their services; and in case no such scale shall be established, they are entitled to receive such compensation as the court shall deem just under the circumstances of each case.<sup>4</sup>

<sup>1</sup> Act of 1864, c. 174, § 19.

<sup>2</sup> Ibid. § 21.

<sup>3</sup> Ibid. § 20.

<sup>4</sup> Ibid. § 22. See *The Amy Warwick*, 2 Sprague, 160.

In any case of capture made by vessels of the navy, the Secretary of the Navy may employ special counsel for captors, when, in his judgment, the services of such special counsel are needed in the particular case, for the due protection of the interests of the captors and of the navy pension fund; and under the direction of the Secretary of the Navy such counsel may institute and prosecute such proceedings in the case as may be necessary and proper for the protection of such interests. The court may allow such compensation as it shall deem just under the circumstances of each case to special counsel for captors, not being the district attorney or any of his assistants, whether appointed by a department of the government or by the captors, for services actually rendered in the cause, to be paid as costs, in whole or in part, either from the entire fund or from the portion awarded to the captors; but no such allowance shall be made except for services rendered on matters as to which the party the counsel represents has an adverse interest to the United States, or an interest otherwise proper in the opinion of the court to be represented by special counsel, or for services rendered in a contestation between parties claiming to participate in the distribution of the proceeds.<sup>1</sup>

The fees of special counsel in prize cases incurred or authorized by any department of the government, or for the defence of captors against demands for damages made by claimants in the district court, not paid by claimants, nor from the prize fund in the particular cause, and audited and allowed by the department incurring or authorizing them, and by the solicitor of the treasury, are a charge upon, and to be paid out of, the funds appropriated for defraying the expenses of suits in which the United States is a party or interested.<sup>2</sup>

Whenever the court allows fees to any witness in a prize cause,<sup>3</sup> or fees for taking evidence out of the district in which the court sits, and there is no money subject to its order in the cause, the same are paid by the marshal, and are repaid to him from

<sup>1</sup> Act of 1864, c. 174, § 23. •

<sup>2</sup> *Ibid.* § 24.

<sup>3</sup> If a vessel is condemned, the master and crew of the prize are not entitled to wages out of the proceeds of the prize, and where such persons are detained not for the purposes of the prize cause but under an order from the Navy Department, after their examination in the prize cause is completed, compensation for their detention cannot be charged on the prize property. *The Lilla*, 2 Sprague, 177.

any money deposited to the order of the court in said cause; and any amount not so repaid the marshal is allowed as witness fees paid by him in cases in which the United States is a party.<sup>1</sup>

No prize property is to be delivered to the claimants on stipulation, deposit, or other security, except where there has been a decree of restitution, and the captors have appealed therefrom, or where the court, after a full hearing on the preparatory proofs, has refused to condemn the property on those proofs, and has given the captors leave to take further proofs, or where the claimant of any property satisfies the court that the same has a peculiar and intrinsic value to him, independent of its market value. In any of these cases, the court may deliver the property on stipulation or deposit of its value, if it is satisfied that the rights and interests of the United States and captors, or of other claimants, will not be prejudiced thereby, a satisfactory appraisement being first made, with an opportunity given to the district attorney and naval prize commissioner to be heard as to the appointment of appraisers. And any money deposited in lieu of stipulation, and all money collected on a stipulation, not being costs, shall be deposited with the assistant treasurer in the same manner as proceeds of a sale.<sup>2</sup>

Whenever any captured vessel, arms, munitions, or other material, is taken for the use of the government before it comes into the custody of a prize court, it should be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory must be sent to the court in which proceedings are to be had; and if taken afterwards, sufficient notice must first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize property taken for, or appropriated to, the use of the government, the department for whose use it is taken or appropriated, must deposit the value thereof with the assistant treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause.<sup>3</sup>

In case of any capture if, by reason of its condition, or because the whole has been appropriated to the use of the United States,

<sup>1</sup> Act of 1864, c. 174, § 25.

<sup>2</sup> Ibid. § 26.

<sup>3</sup> Ibid. § 27.

no part of the captured property can be sent in for adjudication, or if the captured property be entirely lost or destroyed, proceedings for adjudication may be commenced in any district the Secretary of the Navy may designate. And in any such case the proceeds of anything sold, or the value of anything taken or appropriated for the use of the government, must be deposited with the assistant treasurer in or nearest to that district, subject to the order of the court in the cause. If, when no property can be sent in for adjudication, the Secretary of the Navy does not, within three months after any capture, designate a district for the institution of proceedings, the captors may institute proceedings for adjudication in any district. And if, in any case of capture, no proceedings for adjudication are commenced within a reasonable time, any parties claiming the captured property may, in any district court, as a court of prize, move for a monition to show cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district, and on the Secretary of the Navy, as well as on such other persons as the court shall order to be notified.<sup>1</sup>

If it appears to the court, in the case of any prize property ordered to be sold, that it will be for the interest of all parties to have it sold in another district, the court may direct the marshal to transfer the same to the district selected by the court for the sale, and to insure the same with proper orders as to the time and manner of selling the same. And it is the duty of the marshal so to transfer the property; and keep and sell the same in like manner as if the property were in his own district; and he must deposit the gross proceeds of the sale with the assistant treasurer nearest to the place of sale, subject to the order of the court in which the adjudication thereon is pending; and the necessary expense attending the insuring, transferring, receiving, keeping, and selling the said property is a charge thereupon and upon the proceeds thereof; and whenever any such expense is paid in advance by the marshal, and he is not repaid from the proceeds, any amount not so repaid is allowed him as in case of expenses incurred in suits in which the United States is a party. The Secretary of the Navy may, in like manner, either by a general regulation or

<sup>1</sup> Act of 1864, c. 174, § 28.

special direction in any cause, require a marshal to transfer any prize property from the district in which the judicial proceedings are pending to any other district for sale, and the same proceedings shall be had as if such transfer had been made by order of the court, as hereinbefore provided.<sup>1</sup>

If any person wilfully does any act, or aids, assists, or advises, in the doing of any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as prize, or relating to any documents or papers connected with the property, or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States, or any captor or claimant of such property, he is, on conviction, punished by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding five years, or both, at the discretion of the court.<sup>2</sup>

The term "vessels of the navy," in the above provisions includes all armed vessels officered and manned by the United States, and under the control of the department of the navy.<sup>3</sup>

The foregoing provisions are applicable to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States.<sup>4</sup>

In prize causes the libel need not set forth specifically the grounds on which condemnation is sought.<sup>5</sup> An answer in the nature of pleading is irregular; and where a simple claim is filed, and the claimant annexes thereto his answer as a "test affidavit," so much of the document as goes beyond the facts of the claim is not to be regarded.<sup>6</sup>

If no claim is interposed, the court may proceed to a hearing of the cause upon the ship's papers and the evidence taken in preparatory, and if the property appears to belong to enemies, it is immediately condemned. If its national character appear to be doubtful, or neutral, and no claim is interposed, the court do not proceed to a final decree, but the cause is postponed, with a view to enable any person having a title to assert it, within a reasonable time, before the court. This reasonable time has been, by the general usage of nations, fixed at a year and a day after the insti-

<sup>1</sup> Act of 1864, c. 174, § 30.

<sup>2</sup> Ibid. § 31.

<sup>3</sup> Ibid. § 32.

<sup>4</sup> Ibid. § 33.

<sup>5</sup> The Revere, 2 Sprague, 107.

<sup>6</sup> The Revere, 2 Sprague, 107.



tution of the prize proceedings; and if no claim be interposed within that period, the property is deemed to be abandoned, and is condemned to the captors for contumacy, and default of the supposed owner.<sup>1</sup>

Property arrested as prize cannot be attached on the instance side of the court, by persons claiming a lien on the prize, which they contend is superior to the rights of the captors.<sup>2</sup>

The expenses of the crew of a prize vessel who are not needed or used as witnesses, incurred after their arrival in port, are not chargeable upon the proceeds of the prize.<sup>3</sup>

Mortgages on vessels captured *jure belli*, are treated only as liens, subject to be overridden by the capture, and not as *jura in re*, capable of enforcement superior to the claims of the captors.<sup>4</sup>

Prize courts deny damages, or costs, in cases of seizure made upon "probable cause"; that is to say, where there were circum-

<sup>1</sup> The Harrison, 1 Wheat. 298. See also The Avery, 2 Gallis. 386; The Stadt Embden, 1 Rob. Adm. 29. In The Julia, 2 Sprague, 166, Sprague, J., said: "If the vessel and cargo are to be condemned, it must be for default of claimants. I am aware that the rule of the prize courts, to allow a year and a day in case of neutral vessels, for claimants to appear, is not a vested right in neutrals. It is allowed as of right where the condemnation, if decreed, must be solely on the ground of default. If the captors show a clear case of enemy property, or of contraband, or of breach of blockade, the court may condemn the vessel or cargo, although they are under neutral flag and papers, in the absence of claimants, without waiting a year and a day. So, if it shall be proved that the neutral owners have had notice and opportunity to appear, condemnation may go at once, solely on the ground of default, and the presumptions arising therefrom, without other proof. But I think that in this case, in the present state of the proofs, my duty to neutrals requires me to enforce the rule of the year and a day, and I do it on the ground of the mistake or neglect of the capturing power to send in the proper evidence when it was at their option to do so or not."

<sup>2</sup> The Nassau, 4 Wallace, 634.

<sup>3</sup> The Britannia, 2 Sprague, 225.

<sup>4</sup> The Hampton, 5 Wallace, 372. See also Union Ins. Co. v. United States, 6 Wallace, 759; and Act of 1863, c. 90, 12 U. S. Stats. at Large, 762. In The Siren, U. S. Supreme Court, Feb. 1869, a prize, while on her way to port for adjudication, came into collision with another vessel. After the prize was labelled, condemned, and sold as prize, the owners of the vessel damaged intervened and prayed that their damages resulting from the collision might be satisfied out of the proceeds. The collision took place in 1865. The Supreme Court held, reversing the decree of the District Court for the District of Massachusetts, that the prayer of the intervenors should be granted.

stances sufficient to warrant suspicion, though not to warrant condemnation.<sup>1</sup>

Costs are also sometimes awarded against the prize, although the decree is for a restoration of the property.<sup>2</sup>

Only the papers and documents delivered up to the captors are admissible in evidence, and if the captured conceal any, they cannot afterwards put them in.<sup>3</sup> The case is determined only on this evidence and the documents of the prize.<sup>4</sup> The court may, however, if the case demands it, admit further proof, from either party, alone or from both. Mr. Justice Story, in one case said: "Farther proof is not a matter of course. It is granted in cases of honest mistake or ignorance, or to clear away any doubts or defects consistent with good faith. But if the parties have been guilty of gross fraud or misconduct, or illegality, farther proof is not allowed; and under such circumstances, the parties are visited with all the fatal consequences of an original hostile character."<sup>5</sup> Where there is a repugnance between the documents and the depositions, the conviction of the court need not be kept *in equilibrio* till it can receive further proof.<sup>6</sup> Further proof has been allowed where the suspicion or doubt was caused by extrinsic evidence.<sup>7</sup>

Oral testimony is not admitted in prize causes.<sup>8</sup>

It must also be remembered, "that the property subjected to the prize jurisdiction is itself, in the first instance, a part of the

<sup>1</sup> The Thompson, 3 Wallace, 155; The La Manche, 2 Sprague, 207.

<sup>2</sup> The Dashing Wave, 5 Wallace, 170; The James Andrews, 2 Sprague, 121.

<sup>3</sup> The Ann Green, 1 Gallis. 274.

<sup>4</sup> The Dos Hermanos, 2 Wheat. 76; The Ann Green, 1 Gallis. 274, 281.

<sup>5</sup> The Dos Hermanos, 2 Wheat. 76.

<sup>6</sup> The Vigilantia, 1 Rob. Adm. 1, 7.

<sup>7</sup> The Romeo, 6 Rob. Adm. 351. But this is certainly pressing the point very far. A summary of the English cases where further proof was allowed, and which was written by Mr. Justice Story, may be found in the appendix to the first volume of Wheaton, p. 504. See also The London Packet, 2 Wheat. 371; The Pizarro, id. 227; The Frances, 8 Cranch, 348; The Grotius, id. 456; The Adeline, 9 Cranch, 244; The Mary, 8 Cranch, 388; The Venus, 1 Wheat. 112; The Fortuna, 2 Wheat. 161, 3 Wheat. 236; The Friendschaft, 3 Wheat. 14; The Atalanta, 3 Wheat. 409, 5 Wheat. 433; The St. Lawrence, 8 Cranch, 434; The Dos Hermanos, 2 Wheat. 76; The Hazard v. Campbell, 9 Cranch, 205; The Anne, 3 Wheat. 435; La Nereyda, 8 Wheat. 108; The Amiable Isabella, 6 Wheat. 1; The Sally Magee, 3 Wallace, 459; The Amy Warwick, 2 Sprague, 150; The Cuba, 2 Sprague, 168; The Lilla, id. 177.

<sup>8</sup> The Dos Hermanos, 2 Wheat. 76.

necessary evidence in the cause, upon which acquittal or condemnation must go, and that the court will, upon laying a proper foundation, direct a survey, in order to ascertain its nature and character.”<sup>1</sup>

Although the evidence of the captors is not allowed,<sup>2</sup> yet papers from other causes, and papers found on board other ships, are sometimes permitted, and, in the language of Mr. Justice Story, “in other instances of pregnant suspicion, or reasonable doubt, the courts will not suffer a rule, founded upon the mere convenience of practice, to exclude the captors from the benefit of diligent inquiries.”<sup>3</sup> But on an application for further proof, the court refused to allow the captors to put in a letter which had been taken from the vessel previous to her capture by another vessel.<sup>4</sup>

In cases of joint or collusive capture, the usual simplicity of prize proceedings is necessarily departed from, and where there is the least doubt, other evidence than that arising from the captured vessel, or invoked from other prize causes, may be resorted to.<sup>5</sup>

In causes of prize, the ownership is a fact of great and decisive importance; and of this the bill of sale — a document in universal use — is almost conclusive evidence.<sup>6</sup>

The principal grounds for condemning a ship as prize, where the question of nationality is in dispute, are, 1. The entire want

<sup>1</sup> The Liverpool Packet, 1 Gallia. 513, 520.

<sup>2</sup> The Sarah, 3 Rob. Adm. 330.

<sup>3</sup> The Ann Green, 1 Gallia. 274, 282. See also The Vriendschap, 4 Rob. Adm. 166; The Romeo, 6 Rob. Adm. 351. But see Dearle v. Southwell, 2 Lee, 93, where it was doubted whether proceedings could be invoked except where the cause was between the same parties or on the same point. In The Experiment, 4 Wheat. 84, it was held that depositions taken in one prize cause as further proof were not admissible in another prize cause, but the rule was said to be that original evidence taken on the standing interrogatories was. In The Springbok, 5 Wallace, 1, it was said that regularly invocation was not made until after a cause had been fully heard on the ship's documents and the preparatory proofs, and suspicious circumstances appeared from these; but it was held that although the court below had allowed documents found on board other vessels to be invoked in the first hearing, the decree would not be necessarily reversed, as decrees of condemnation had passed in both the cases invoked, one *pro confesso*, and the other by a decree of the highest appellate court.

<sup>4</sup> The Sarah, 3 Rob. Adm. 330.

<sup>5</sup> The George, 1 Wheat. 408.

<sup>6</sup> The Vigilantia, 1 Rob. Adm. 1; The Sisters, 5 id. 155; The San Jose Indiano, 2 Gallia. 268, 284.

of the necessary papers ; 2. Their destruction ; 3. Their material alteration or falsification ;<sup>1</sup> and 4. The time when the papers were made out, as whether before or after the war, is often material. 5. Next in importance is the conduct of the master and officers ; 6. Their prevarication or evident falsehood in the preliminary proof ; 7. Their refusal or inability to give a good account of the ship and cargo ; 8. The domicile of the master and officers.

The spoliation of papers, by which is meant, not merely their total destruction, but such falsification as makes them useless or worse, as evidence, is said to be regarded by the law of nations as conclusive evidence of hostile character or other liability to capture. In England, the courts permit it to be explained,<sup>2</sup> and the admiralty courts of this country are, perhaps, even more lenient than those of England.<sup>3</sup> It is, however, always and everywhere a circumstance of grave suspicion.<sup>4</sup>

There are also many other circumstances indicative of a want of good faith and fair dealing on the part of the claimants of the prize and their agents and servants, which render the property subject to condemnation.<sup>5</sup>

Persistent misrepresentation by the claimant of the character and destination of the voyage of a vessel is sufficient cause for condemnation of the vessel and cargo.<sup>6</sup>

So, where a former enemy owner remained as master a year after the alleged sale to a neutral, and the alleged neutral owners, although they resided near the place where the property was libelled, handed the whole matter of the claim and defence over to the former owner as their agent.<sup>7</sup>

<sup>1</sup> *The Cuba*, 2 Sprague, 168.

<sup>2</sup> See *The Hunter*, 1 Dods. 480 ; *The Rising Sun*, 2 Rob. Adm. 104 ; *The Maria Magdalena*, id. 106. In *The Two Brothers*, 1 Rob. Adm. 181, the suppression of papers, though said not to be cause for condemnation, was held to raise great suspicion, and the defence that they were merely private papers was held to be no excuse.

<sup>3</sup> See *The Pizarro*, 2 Wheat. 227.

<sup>4</sup> *The Circassian*, 2 Wallace, 135 ; *The Andromeda*, id. 482 ; *The Bermuda*, 3 Wallace, 514.

<sup>5</sup> *The Cornelius*, 3 Wallace, 214 ; *The Springbok*, 5 id. 1 ; *The Jenny*, id. 183 ; *The Pearl*, id. 574 ; *The Sea Lion*, id. 630 ; *The Adela*, 6 id. 266.

<sup>6</sup> *The Revere*, 2 Sprague, 107 ; *The Ocean Bird*, 2 Sprague, 261.

<sup>7</sup> *The Andromeda*, 2 Wallace, 481.

Intent to violate a blockade may be inferred in part from delay of the vessel to sail after being fully laden, and from changing the ship's course in order to escape a ship-of-war cruising for blockade-runners, or to elude visitation and search.<sup>1</sup> So it may be inferred from bills of lading of cargo, from letters and papers found on board the captured vessel, from acts and words of the owners or hirers of the vessel and the shippers of the cargo and their agents.<sup>2</sup>

If a neutral owner of the property captured claims another part, which belongs to an enemy, for the purpose of deceiving the court, the part belonging to the neutral will be condemned as a penalty for his fraudulent conduct.<sup>3</sup>

The interest of witnesses does not render them incompetent in prize causes, any more than in those of salvage, and for the same reason of necessity. But their interest requires the court to watch them narrowly.<sup>4</sup>

The official declarations of the proper authorities of a foreign State are evidence of facts which are within the scope of their authority, and the proper subjects of such declaration.<sup>5</sup>

Certain presumptions of law exist in causes of prize, and should be stated. Possession by an enemy is presumptive proof, though not conclusive, of hostile character.<sup>6</sup> So ships are presumed to belong to the country under whose flag they sail. And it has been thought that this presumption should be conclusive, on the ground that no owner should be permitted to deny the character under which he seeks protection and safety.<sup>7</sup>

If the capture is made in neutral waters, this is not a defence which an owner of the vessel can avail himself of.<sup>8</sup>

<sup>1</sup> *The Baigorry*, 2 Wallace, 474.

<sup>2</sup> *The Circassian*, 2 Wallace, 135.

<sup>3</sup> *The Lilla*, 2 Sprague, 177.

<sup>4</sup> *The Anne*, 3 Wheat. 435; *The Grotius*, 9 Cranch, 368. See also *The Falcon*, 6 Rob. Adm. 194, 197; *The James Cook*, Edw. Adm. 261; *The Diana*, 2 Gallis. 93, 97; *The Magnus*, 1 Rob. Adm. 31, 35.

<sup>5</sup> *The Huntress*, 6 Rob. Adm. 104, 110.

<sup>6</sup> *The Resolution*, 2 Dall. 19. See also *The Countess of Lauderdale*, 4 Rob. Adm. 283; *The Magnus*, 1 id. 31.

<sup>7</sup> *The Vigilantia*, 1 Rob. Adm. 1; *The Vrow Anna Catharina*, 5 id. 161; *The Success*, 1 Dods. 131; *The Fortuna*, id. 81.

<sup>8</sup> *The Sir William Peel*, 5 Wallace, 517; *The Lilla*, 2 Sprague, 177.

## CHAPTER XIV.

## OF COSTS IN ADMIRALTY.

Costs in admiralty do not necessarily follow the result of the suit, but are entirely within the discretion and control of the court, and although each court has certain rules to which it adheres under ordinary circumstances, it does not hesitate to make such a special decree as to costs in any case as the merits and the justice of that case, or public policy, may seem to require.

The general rule may be said to be the same in admiralty as at common law and in equity, that costs follow the result, and that the successful party is entitled to them.<sup>1</sup> But this rule is often departed from in practice. Thus costs have been decreed for the plaintiff where he recovered no debt, because he had been induced to begin the suit by the misconduct of the defendant.<sup>2</sup>

Where a suit had been brought on a state of facts which, as the law had previously been understood and administered in the court, would have authorized a recovery, but which under a recent decision of the Supreme Court of the United States was deemed insufficient, the court ordered the libel to be dismissed without costs.<sup>3</sup>

And where a party recovers but a small part of the sum demanded, costs have been refused.<sup>4</sup>

Where a libel was dismissed in the district court for want of jurisdiction, and costs awarded against the libellant, and on appeal by the libellant from the whole decree, the circuit court affirmed so much of the decree as dismissed the libel, and reversed so much of it as awarded costs, no costs in the circuit court were allowed to either party.<sup>5</sup>

<sup>1</sup> In *The Segredo*, 1 Spinks, 36, 63, the court said that costs were given in that case because, "it is now laid down by all the courts that costs are to follow the results of the case."

<sup>2</sup> *Pettit's Case*, U. S. D. C. Mass., *Dunlap's Adm. Practice*, 102.

<sup>3</sup> *The Sarah Starr*, 1 Sprague, 453.

<sup>4</sup> *The John Walls, Jr.*, 1 Sprague, 178.

<sup>5</sup> *The McDonald*, 4 Blatchf. C. C. 477.

In salvage, it has been said that the general rule must be applied with somewhat greater leniency and relaxation because of the expediency of encouraging salvors in the rescue and preservation of property upon the seas.<sup>1</sup> So in a case where a legal set-off was to be made against the claim of a mate for wages, which would have been more than his wages, the court ordered that the claim for wages and costs should be allowed in full, and then the set-off made only against this amount.<sup>2</sup> And costs are not decreed against seamen, if they had any probable cause for bringing their action, unless it is clearly shown that they are able to pay them.<sup>3</sup> If many suits are brought where all the interests might have been embraced in one, only the costs of one are allowed.<sup>4</sup> So where a suit was brought against the owners of a vessel, and another suit against the master, for the wrongful discharge of the libellant at a foreign port, it was held that, as the master had done him no injury, except that resulting from the breach of the contract, and as the libellant could recover for that against the owners, the suit against the master should be dismissed with \$10 costs to the respondent.<sup>5</sup>

If several seamen join in one libel, and severally have decrees for their respective wages, and from some appeals are taken, while from others no appeal lies, those who have obtained final decrees can recover all the costs they have advanced or for which they are liable.<sup>6</sup>

Where the log of a vessel had been tampered with by the master and mate of a vessel, the court, although rejecting the claims of salvors, condemned the vessel to pay the costs.<sup>7</sup>

<sup>1</sup> *The Princess Alice*, 3 W. Rob. 138, 143. From this reasoning it might be inferred that where salvors were entitled to recover, they should have their costs, but in *The Red Rover*, 3 W. Rob. 150, a claim of salvage was pronounced for, but without costs, the nature of the claim being very trivial. See *The Joseph C. Griggs*, 1 Bened. Adm. 81; *The Theodore*, Swabey, Adm. 351; *The Martha*, id. 489; *The Sovereign*, Lush. Adm. 85; *The Little Joe*, id. 88; *The Alpha*, id. 89.

<sup>2</sup> Anonymous, U. S. D. C. Mass., Dunlap's Adm. Practice, 102.

<sup>3</sup> See *ante*, p. 418, n. 1.

<sup>4</sup> *The Henry Ewbank*, 1 Sumner, 400, 408.

<sup>5</sup> *Sheffield v. Page*, 1 Sprague, 285.

<sup>6</sup> *Two Hundred and Ninety Barrels of Oil*, 1 Sprague, 475.

<sup>7</sup> *The Anastasia*, 1 Bened. Adm. 166.

The costs of further answers are made to fall on the defendant, if they are made necessary by his fault.

The taxable costs are now regulated by statute.<sup>1</sup> This statute gives proctors, "on a final hearing in admiralty, a docket fee of twenty dollars,"<sup>2</sup> except in cases where the libellant recovers less than fifty dollars, and then the docket fee is only ten dollars. "For each deposition taken and admitted in evidence in the cause, two dollars and fifty cents."<sup>3</sup> A compensation of five dollars is also allowed for the services rendered in cases removed from a district to a circuit court by appeal.<sup>4</sup> The act also provides for clerks' fees and marshals' fees.<sup>5</sup>

Counsel fees have been sometimes allowed as part of the costs ;<sup>6</sup>

<sup>1</sup> Act of 1853, c. 80, 10 U. S. Stats. at Large, 161. The Act of 1847, c. 55, 9 U. S. Stats. at Large, 181, provided that where the amount recovered was less than \$100, the costs should not be more than 50 per cent of the amount, and should be divided in a certain way. But it has been held that this statute is repealed by the act of 1853, and full costs are now allowed although the amount is less than one hundred dollars. *The Sloop Canton*, 21 Law Rep. 473.

<sup>2</sup> This is construed to give one docket fee for each court, and not one for each term. *Dedekam v. Vose*, 3 Blatchf. C. C. 77. The docket fee is taxable on a final disposition of the cause by the court. *Hayford v. Griffith*, 3 Blatchf. C. C. 79. The appeal in this case was dismissed on motion for irregularity in the way it was brought up. Held, that the docket fee was taxable. See *Dedekam v. Vose*, 3 Blatchf. C. C. 153.

<sup>3</sup> If a deposition is taken and used in the district court, and then read in the circuit court, a fee is not taxable for it in the circuit court. *Dedekam v. Vose*, 3 Blatchf. C. C. 77. See *Stimson v. Brooks*, 3 Blatchf. C. C. 456.

<sup>4</sup> Where a case was removed into the circuit court before the passage of this act, it was held that this fee was not taxable. *Dedekam v. Vose*, 3 Blatchf. C. C. 77.

<sup>5</sup> Under the first section of the act of 1853, which provides that "in case the debt or claim shall be settled by the parties without a sale of the property, the marshal shall be entitled to a commission of one per cent on the first five hundred dollars of the claim or decree, and one half of one per cent on the excess over five hundred dollars," it has been held that where the claim was settled before the claimant appeared in court, the marshal was not entitled to the commission. *Bone v. Steamer Norma*, 1 Newb. Adm. 533. If a marshal holds a vessel by virtue of two warrants to arrest, in different suits, the custody fees are to be charged equally upon the two suits. *The John Walls, Jr.* 1 Sprague, 178.

<sup>6</sup> *The Apollon*, 9 Wheat. 362. Mr. Justice *Story*, in delivering the opinion of the court, said : "The fifth item, allowing five hundred dollars as counsel fees, is, in our opinion, unexceptionable. It is the common course of the admiralty to allow expenses of this nature, either in the shape of damages, or as part of the costs. The practice is very familiar on the prize side of the court. It is not less



but we presume that they would not be now, except to the extent prescribed by the above statute.<sup>1</sup>

The subject of costs upon an appeal to the Supreme Court has been a matter of much controversy, but it is now settled by a general rule of the court passed in 1838.<sup>2</sup> This provides that "In all cases where any suit shall be dismissed in this court, except where the dismissal shall be for want of jurisdiction,<sup>3</sup> costs shall be allowed for the defendant in error, or appellee, as the case may be, unless otherwise agreed by the parties.

"In all cases of affirmance of any judgment or decree in this court, costs shall be allowed to the defendant in error, or appellee, as the case may be, unless otherwise ordered by the court.<sup>4</sup>

"In all cases of reversals of any judgment or decree in this court,<sup>5</sup> (except where the reversal shall be for want of jurisdiction,<sup>6</sup>) costs shall be allowed in this court for the plaintiff in error or appellant, as the case may be, unless otherwise ordered by the court.

the law of the court in instance causes, it resting in sound discretion to allow or refuse the claim." See also *Carter v. Am. Ins. Co.* 3 Pet. 307.

<sup>1</sup> *The Ship Liverpool Packet*, 2 Sprague, 37.

<sup>2</sup> Rule 45, 1 How. xxxvi. This rule is now the 24th, 21 How. xiii.

<sup>3</sup> *M'Ivers v. Wattles*, 9 Wheat. 650. In *Winchester v. Jackson*, 3 Cranch, 514, decided before the above rule was passed, costs were allowed upon a dismissal of a writ of error for want of jurisdiction, the original defendant being also the defendant in error. In *Strader v. Graham*, 18 How. 602, a suit was brought in a State court and decided in favor of the plaintiff. The defendant then sued out a writ of error to the Supreme Court of the United States, and the writ of error was dismissed for want of jurisdiction. The original plaintiff then applied to have his costs in the Supreme Court taxed, but the court refused to do so, as the cause was dismissed for want of jurisdiction. See also *The Mayor v. Cooper*, 6 Wallace, 247; *The McDonald*, 4 Blatchf. C. C. 477.

<sup>4</sup> In *Post v. Jones*, 19 How. 150, a whaling vessel was wrecked in Behring's Straits, and was sold, together with the oil and bone on board, to the captains of three other whaling vessels, who brought the cargo home. The court held the sale void, but decreed salvage, affirming the decree of the circuit court, from which the salvors had appealed. In regard to costs, the court said: "As this case has presented very unusual circumstances, and as we think the claimants have acted in good faith in making their defence, all the taxed costs should be paid out of the fund in court."

<sup>5</sup> *Bradstreet v. Potter*, 16 Pet. 317.

<sup>6</sup> *Montalet v. Murray*, 4 Cranch, 46. The clause in brackets is omitted in the new rule.

"Neither of the foregoing rules shall apply to cases where the United States are a party; but in such cases no costs shall be allowed in this court for or against the United States.<sup>1</sup>

"In all cases of the dismissal of any suit in this court, it shall be the duty of the clerk to issue a mandate, or other proper process, in the nature of a *procedendo*, to the court below, for the purpose of informing such court of the proceedings in this court, so that further proceedings may be had in such court as to law and justice may appertain.

"When costs are allowed in this court, it shall be the duty of the clerk to insert the amount thereof in the body of the mandate, or other proper process, sent to the court below, and annex to the same the bill of items taxed in detail."

If judgment is entered up in the Supreme Court, and a blank left for the amount of the costs, it is competent for the court below, at a subsequent term, to tax the costs and have the blank filled *nunc pro tunc*.<sup>2</sup> If the judgment of the court below is reversed, the appellant is of course entitled to his costs in that court.<sup>3</sup> And a judgment for costs includes all the costs belonging to the suit, whether prior or subsequent to the rendition of the judgment.<sup>4</sup> If the libel is dismissed "without costs to either party," the liability of a party to the clerk for his fees for services rendered to such party, is not thereby affected.<sup>5</sup>

At common law, where costs always follow the result, it is necessary to decide claims to nominal damages upon strict legal principles, but in admiralty, where costs are discretionary, suits for mere nominal damages, unless they are so connected with a substantial right, that it can only be vindicated in this way, will not be entertained.<sup>6</sup>

<sup>1</sup> *United States v. Boyd*, 5 How. 29.

<sup>2</sup> *Sizer v. Many*, 16 How. 98.

<sup>3</sup> *M'Knight v. Craig*, 6 Cranch, 183; *Riddle v. Mandeville*, 6 Cranch, 86.

<sup>4</sup> *Peyton v. Brooke*, 8 Cranch, 92.

<sup>5</sup> *In the Matter of Stover*, 1 Curtis, C. C. 201.

<sup>6</sup> *Barnett v. Luther*, 1 Curtis, C. C. 434.

## CHAPTER XV.

## OF TENDERS.

IN the courts of common law the doctrine of tender is very precise, and the practice equally so. But this is not so in admiralty; there the thing itself is approved and encouraged, and all questions relating to it are determined only *ex æquo et bono*. Any real offer to pay, by one then ready and able to pay, is treated as a valid tender without inquiring whether the money was produced or not, or in what form,<sup>1</sup> and if an objection be made as to the method of tender, he who makes it is allowed a reasonable time to procure the means required.

If a premature action is brought, where a fair settlement has been offered, the plaintiff, though he succeed, will not get his costs, and may have to pay them.<sup>2</sup> In England tenders are more strictly regarded, in cases of salvage,<sup>3</sup> (and this has been so said

<sup>1</sup> See *Dedekam v. Vose*, 3 Blatchf. C. C. 44. In a note to *Mayo v. Snow*, 2 Curtis, C. C. 102, 103, it is said: "I am informed that in the district court, *Sprague, J.*, on the question of tender, held that an offer to pay, made in good faith, with undisputed ability and readiness to perform, renewed in the answer in court, was a good and sufficient tender in the admiralty, although originally accompanied with a request for a receipt, and although the money was not subsequently brought into court."

<sup>2</sup> See *Dunlap's Adm. Practice*, 103.

<sup>3</sup> The *Vrow Margaretha*, 4 Rob. Adm. 103. The tender does not appear to have been made in this case until after the suit was commenced, and it was a verbal one, and the evidence rendered it uncertain whether it was intended to include costs. Sir *Wm. Scott* held under these circumstances that although the amount tendered was a sufficient compensation for the services performed, yet costs should be allowed, and said: "I see enough of the inconvenience of proceeding in this loose manner, to make it necessary for me to require in future, as a universal rule of court, that a tender should be made, in the first stage of the proceeding, in a regular form. The court will then consider its sufficiency; and if it shall be pronounced sufficient, the court will make the party who refuses such an offer liable not only to his own costs, but also to those of the other party, if it shall appear that proceedings have been vexatiously pursued." And in *The Ocean*, 1 W. Rob. 334, it was held that where it was alleged in an act on petition that

in this country,<sup>1</sup>) where everything of this sort is usually done by formal acts in court. But if a distinct and sufficient tender of compensation and costs up to the time of tender were made, actually and in good faith, and rejected, we do not believe the salvors would, in this country, be permitted to recover their costs, however informal it might be.<sup>2</sup> And it has been held, that if such a tender is made in England, and the parties refuse to accept it, but proceed in the case, they are not entitled to subsequent costs.<sup>3</sup>

The costs of a suit have been cast upon a proctor whose misconduct caused the suit and the expense.<sup>4</sup> If a tender be made in

certain services had been rendered, and certain damages sustained, a tender to stop the action and to entitle the party making it to all the benefits of a tender in court, must include all the damages as well as the compensation. See also *The Sovereign*, Lush. Adm. 85; *The Ulster*, Lush. Adm. 424.

<sup>1</sup> *Evans v. The Ship Charles*, 1 Newb. Adm. 329.

<sup>2</sup> See *Hessian v. The Edward Howard*, 1 Newb. Adm. 522.

<sup>3</sup> *The John & Thomas*, 1 Hagg. Adm. 157, n.; *The Eleanora Charlotta*, id. 156. See also *The Frederick*, id. 211, 218. In *The Emu*, 1 W. Rob. 15, where a tender in a salvage suit was pronounced to be sufficient, no costs were given, but the court stated that in future cases, where a tender was pronounced for, and held to be sufficient, costs would always be given. We should construe this language to mean that costs would be given against the salvors, for the learned judge went on to say: "When the question as to the sufficiency of the tender is nicely balanced, the court will not consider itself bound to give costs, but the general principle will be in favor of costs." In *The Batavier*, 1 Spinks, 169, the tender was pronounced sufficient, and the salvors condemned in costs. The general principle was stated by Dr. *Lushington* in the case of *The Queen*, cited 1 Spinks, 175, as follows: "The rule I have endeavored to follow is not to bind myself in all salvage cases to give costs against salvors, unless I think the tender was so large that the salvors in the exercise of a sound discretion could not do otherwise than accept it. Here I think the tender is sufficient, but it is not so much as to lead me to blame the salvors for not accepting it. I therefore pronounce for the tender, but without costs." See also *The Albatross*, and the case of *The Chancellor*, both cited 1 Spinks, 175; *The Hopewell*, 2 Spinks, 249. In the case of *The Paris*, 1 Spinks, 289, 291, Dr. *Lushington* said: "I consider it my duty to pronounce for the tender; and, I am sorry to say, to condemn the parties in the costs. That is a measure which I am reluctant to pursue, though, according to the practice in other courts, where the tender is considered sufficient, they uniformly follow that course. I have considered myself justified in some cases in not proceeding to that extremity on grounds of public policy, but in this case I see no sufficient grounds for departing from the rule."

<sup>4</sup> *The Frederick*, 1 Hagg. Adm. 211, 225.

admiralty and rejected, the court will afterwards, for good cause, reduce the amount, and decree a less sum to the libellant.<sup>1</sup>

In a case where a part-owner of the salving vessel had an interest in the vessel salvaged, and he was, therefore, not joined as libellant, the court held, that in considering the sufficiency of the tender made by the defendants, the amount which the owner in both vessels would be entitled to as salvor was to be regarded, and that, if the tender were large enough to pay the other salvors, it would be sufficient.<sup>2</sup>

The practice in the English admiralty is, when money is paid into court as a tender, not to pay it out until the conclusion of the cause.<sup>3</sup>

<sup>1</sup> *The General Palmer*, 2 Hagg. Adm. 176, 180. Salvors who refused a tender were in one case obliged to pay costs. *The Albion*, 2 Hagg. Adm. 180, note.

<sup>2</sup> *The Caroline*, Lush. Adm. 334.

<sup>3</sup> *The Annie Childs*, Lush. Adm. 509.

## CHAPTER XVI.

## OF THE DECREES IN ADMIRALTY.

THE decrees in admiralty are moulded by the court to meet the exigencies of each case. They are sometimes in writing, and after such delay as the court deem proper ; sometimes spoken by the court, with or without delay, and reduced to writing by the clerk. And if, after the case is heard, the court incline to the opinion that either party has not yet made out his full case, or full defence, but may do so if delay and further opportunity for proof and a rehearing are granted, the court will make such order, instead of a decree on the merits. And even after a decree is made, we should be inclined to hold that the court have the power of varying the same for the purpose of correcting any mistake or oversight, although such a power would be used cautiously and perhaps reluctantly.<sup>1</sup> This subject is interesting, and has been much considered by the courts ; and we give the authorities at some length in our note.<sup>2</sup> It is to be noticed, however, that this

<sup>1</sup> In *The Palmyra*, 2 Wheat. 10, a case was dismissed in the Supreme Court on the ground that there had been no final decree in the circuit court. At the next term it appearing that a final decree had actually been made, the court ordered the cause to be reinstated. So in *Alviso v. United States*, 6 Wallace, 457, where a cause dismissed at one term for the want of citation was reinstated at the next term, on its being shown that a citation had been signed, served, and filed, and that the mistake was owing to a loss of some of the records in the clerk's office by fire.

<sup>2</sup> The question was elaborately discussed in the case of *The Monarch*, 1 W. Rob. 21. The suit was a cause of collision before Sir J. Nicholl, and he decreed that both parties were equally in fault, and condemned the owners of one of the ships in a moiety of the amount of such damage, and of the costs incurred on behalf of the other party, and referred the case to the registrar and merchants to determine the amount of the damage, etc. It will be noticed that this was an interlocutory, and not a final decree. Sir J. Nicholl afterwards died, and an application was made to Dr. Lushington, then judge of the court, to vary the decree in question as regarded the costs, on the ground that it was inequitable, and that the late judge could not have intended to burden one side with three fourths of the expenses. Affidavits were also offered to show that the registrar had not

subject is not touched upon by the new Admiralty Rules of the Suit taken down the decree aright, but Dr. *Lushington* refused to receive the affidavits, especially as the registrar stated that he subsequently took the opinion of the late judge as to the accuracy of the decree in question. The House of Lords had previously decided that where both vessels were in fault, each should bear its own costs, and Dr. *Lushington* referred to the power of the court of chancery to alter, vary, and amend a decree before its enrolment, and stated that he was at a loss to conceive upon what grounds a court of admiralty in its equitable jurisdiction was to be precluded from a similar discretionary authority, and said: "In the exercise of this authority I should, I trust, use the greatest caution, and the limit which I would propose to myself in future cases is this, merely to make such an alteration of an error arising from defect of knowledge or information upon a particular point, as the justice of the case requires; at the same time let it be understood, that it must be an error instantly noticed, and brought to the attention of the court with the utmost possible diligence." With respect to the case before the court, the learned judge stated that he should vary the decree to the extent of making it accord with the judgment of the House of Lords.

In *The Glenburn*, Brow. & L. Adm. 62, the defendant gave his consent to a decree of the court pronouncing for the validity of a bottomry bond. Soon after a decision was given in another case, and the defendant asked that the decree might be set aside on the ground that the facts in the case on the authority of the decision constituted a defence. The motion was overruled.

In *The Martha*, Blatchf. & H. Adm. 151, a libel for wages was prematurely filed. The defendant pleaded a dilatory plea, and joined with it a defence on the merits. After a full hearing, the court ordered the vessel to be restored without costs, on the ground that the defence on the merits was not sustained, and the libellant failed on account of having brought the suit too soon. A decree to this effect was entered, and at the next term the counsel for the claimant applied to the court for leave to reargue the question of costs, and a manuscript decision of the circuit court was produced overruling the doctrine of the court on the merits of the case, so that the claimant should have been entitled to a judgment on the merits. And, after hearing counsel on both sides, the court decreed that costs should be awarded. The question then arose whether the surety for costs was liable or only the libellant. It was contended that the court had no right to reverse the first decree, subsequent to the term at which the decree was rendered, and Judge *Betts* so held, and pronounced the last decree a nullity, and the rule was said to be that a rehearing could not be granted except with the free consent of all the parties to be affected by it.

In the case of *The Steamboat New England*, 3 Sumner, 495, a decree for salvage was rendered, but it was discovered after the final adjournment of the court, that by a mistake of the time, nature, and operation of the decree, the benefit intended by it to the salvors was wholly defeated, and they were burdened with expenses beyond the salvage awarded. The mistake was discovered the morning after the final adjournment, and an application was made to the district judge to allow an appeal. The minutes only of the decree had been stated while the court was in session, and the decree was not drawn out in form until the morning after

preme Court, except so far as the Twenty-Ninth and Fortieth Rules provide for the case of a default for not answering the libel.<sup>1</sup>

the final adjournment. The judge of the district court refused to allow an appeal, but application for leave to file one was made by all the salvors except one, who filed a petition in behalf of himself and the other salvors in the nature of a libel for a rehearing, or of a libel of review, in the district court. This petition was dismissed by the district court, for want of jurisdiction, and an appeal taken. Mr. Justice *Story* held that the decree pronounced by the district judge was an interlocutory, and not a final decree, and that the district court had the power to vary and amend it. The general power of the court to alter its decrees was considered at length, and the conclusions of the learned judge were that a court of admiralty has the power to rehear a cause after a decree has been pronounced, pending the term, and before the proceedings have been finally enrolled or drawn up and entered on the record, if there was a manifest mistake, going substantially to the merits even with some slight ingredients of negligence on that side, and without any circumstances of fraud on the other. Great doubt was expressed whether a rehearing could be granted after a final decree was made, but it was thought that a libel in the nature of a bill of review in equity would lie after a final decree, under similar circumstances as in equity, and the learned judge said: "But upon the most careful reflection, which I have been able to bestow upon it, the result to which I have brought my mind is, that if the district court has a right to entertain a libel of review in any case, it must be limited to very special cases, and either where no appeal by law lies, because the matter is less in value than is required by law to justify an appeal, or the proper time for any appeal is passed, and the decree remains unexecuted; — or where there is clear error in matter at law; or, if not, where the decree has been obtained by fraud; or where new facts, changing the entire merits, have been discovered since the decree was passed, and there has been not only the highest good faith (*uberrima fides*), but also the highest diligence and an entire absence of just imputations of negligence; and finally, where the principles of justice and equity require such an interference to prevent a manifest wrong. Further than this I am not prepared to go; and I may say, that with my present impressions I should go thus far with some hesitation, and pause at every step.

In *Janvrin v. Smith*, 1 Sprague, 13, the power of granting a review by a court of admiralty was held not to be limited to the term at which the original decree was passed.

In *The Enterprise*, 2 Curtis, C. C. 317, it was said to be a very grave question, whether the district court had the power to entertain a libel for a review. It was held that the appellee, in whose favor both the original decree and the decree in review were made, could not raise the question in the circuit court. In *North-western Iron Co. v. Hopkins*, U. S. C. C. Illinois, 14 Am. Law Reg. 44, it was held that a libel for review, filed after the term has passed at which the decree complained of was rendered, and after the decree had been executed, would be entertained by a court of admiralty, when actual fraud was charged, and the libellant was without fault, and would be otherwise without remedy.

<sup>1</sup> See *ante*, p. 400, 401.



In New York, rules have been passed giving the court power to grant a rehearing if application is made at the term when the decree is pronounced, or there is a stay of proceeding by order of the judge. It is also provided that no libel of review will be entertained in causes subject to appeal, nor unless it is filed before the enrolment of the decree, or return of final process.<sup>1</sup> And, even after any decree, any person having an interest in the proceeds, may intervene for them by petition praying for a delivery thereof to him for reasons stated.<sup>2</sup> If separate interests and claims are joined in one libel, to which there is but one answer, the court may, nevertheless, make separate decrees for each separate interest, and should do so whenever this may affect the question of costs or appeal.

In causes of contract, interest is generally allowed from the time of a demand made, and if no special demand is proved, from the time of the commencement of the suit.<sup>3</sup>

Where a libel is filed for damage to the cargo, and a cross libel for freight, and the court find that the damage exceeds the freight, the decree should not be for the amount of the damage less the freight, but each libellant should have a decree for the amount due him.<sup>4</sup>

The decrees may be final, or interlocutory, and they may be interposed at any stage of the proceedings to effect any purpose which the justice of the case requires.

If the action be *in rem* and the property in the custody of the court, if the libellant prevails, there is a decree of condemnation and sale, and the terms and mode of the sale and satisfaction of the libellant's claim are usually specified in the decree. If the libellant *in rem* has shown a clear legal right to a condemnation and sale, it is said that the court have no discretionary power to refuse or delay a sale.<sup>5</sup> And generally, wherever any specific relief is prayed for, although there be connected with it a prayer

<sup>1</sup> In *The Wm. Hutt*, Lush. Adm. 25, where an interlocutory order was made, and afterwards a final decree, which was appealed from, but no notice taken of the interlocutory order; it was held that the court making the order, on the case being remitted to it, could not rescind the order.

<sup>2</sup> See *ante*, p. 231 - 235.

<sup>3</sup> *Gammell v. Skinner*, 2 Gallis. 45.

<sup>4</sup> *The Water Witch*, 1 Black, 494.

<sup>5</sup> *Davis v. A New Brig*, Gilpin, 473.

for general relief, the court have no power to grant a relief which is either inconsistent with or different from that which is prayed.<sup>1</sup>

In a suit *in personam*, the defendants not being within the district, but their property attached and no appearance entered, the decree will not be against the defendants personally, but only against the property attached. If that property consists of specific articles, the court will order a sale; but such sale conveys only the rights of the debtor, and does not divest liens or rights of third parties. And, if the property attached be money in the registry, the decree will be satisfied therefrom.<sup>2</sup>

So, the decree may be for further proofs, or for delivery or restoration of the property to the owner; in which case a warrant of restoration follows. If the respondent has taken the property on stipulation, sometimes this warrant is made, and sometimes the decree only; but if the libellant prevails, the respondent may surrender the property to the court; if, however, he does not, execution will issue on the stipulation at once, except in revenue cases, in which certain delay is required by acts of Congress.

If in a libel of information, the respondent prevails, the courts give to the prosecuting or seizing officer a certificate of probable cause, if in their judgment he had such cause for the seizure, and this protects him from prosecution for making the same.<sup>3</sup> The final decree of the courts of the United States, in a case of forfeiture regularly before them, is conclusive.<sup>4</sup>

Decrees in admiralty should be *secundum allegata*, as well as *secundum probata*, and the libellant is not permitted to set forth one thing in his libel and prove another.<sup>5</sup> The reason of the rule is obvious. It is, that the respondent may know the exact case he

<sup>1</sup> *Wilson v. Graham*, 4 Wash. C. C. 53.

<sup>2</sup> *Boyd v. Urquhart*, 1 Sprague, 423.

<sup>3</sup> Act of 1799, c. 22, § 89, 1 U. S. Stats. at Large, 696; Act of 1807, c. 19, 2 U. S. Stats. at Large, 422.

<sup>4</sup> *Gelston v. Hoyt*, 3 Wheat. 246.

<sup>5</sup> *McKinlay v. Morrish*, 21 How. 343; *The Hoppet v. The United States*, 7 Cranch, 389. See also *Jenks v. Lewis*, Ware, 51; *The Sch. Boston*, 1 Sumner, 328, 331; *Ward v. The Brig Fashion*, 1 Newb. Adm. 41, 6 McLean, C. C. 195; *The North American*, Swabey, Adm. 358; *The Ann*, Lush. Adm. 55; *The Despatch*, Lush. Adm. 98; *The Haswell, Brow. & L. Adm.* 247; *The Amalia*, id. 311.

has to meet, and prepare himself accordingly. But it has been held, that if the allegations of the libellant in a cause of collision, imputing fault to the vessel proceeded against, are not sustained by the evidence, yet, that if the facts admitted by the respondent, or set forth in his answer, show that he was in fault, the libellant may recover.<sup>1</sup>

We are, however, clearly of the opinion, that not only on prin-

<sup>1</sup> *The Clement*, 2 Curtis, C. C. 363. The libel alleged that both vessels were on the starboard tack, the pilot-boat (the libellant) close to the wind, and to the leeward of the brig (the respondent), when the brig suddenly changed her course, and kept off, and struck the pilot-boat, which was sunk, etc. The answer denied that the brig kept off and struck the pilot-boat, but stated that she kept her course until she luffed to lessen the force of the collision. The district court was of the opinion, that the allegations of the libel were not sustained by the evidence, but that it appeared that the case was one of two vessels sailing in converging courses on the same tack, the pilot-boat close-hauled, and the brig with the wind two points free; that the rule of navigation required the brig to avoid the pilot-boat, unless there were special circumstances to render the rule inapplicable, and a decree was entered for the libellant. In the circuit court it was contended, that the decree should be reversed, because it was rested upon facts not alleged in the libel, but Mr. Justice Curtis sustained it for the reasons set forth in the text. Upon appeal to the Supreme Court, that court was equally divided, but as no opinion was given, we cannot state on what point the judges differed. Reference is made by the learned judge to that class of collision cases, where the decree is in conformity with the separate allegations of neither of the parties; namely, cases of mutual fault, where the libellant states that his vessel exercised due care, and imputes fault to the vessel proceeded against, while the claimant denies the fault imputed to him, and alleges that the vessel of the libellant is in fault, and the court finds part of the allegations in each pleading to be true, and divides the loss. But in the present case, no part of the libel imputing fault was sustained by the pleading, and we are unable to see the analogy between the two cases. Some stress, moreover, appears to be laid on the remark of Dr. *Lushington* in *The Lady Anne*, 1 Eng. L. & Eq. 670, 674; namely, "It is quite evident in this case that the point on which it has hinged has never been touched upon at all in the pleadings." It seems, however, to have escaped the notice of the learned judge that the Privy Council for this very reason remitted the case to the admiralty court, with the directions that it should be further written to.

In *Dupont de Nemours v. Vance*, 19 How. 162, an action was brought on a contract of affreightment against the vessel for non-delivery of goods. The answer set up a necessary jettison of that part of the cargo which was not delivered. The court found that this defence was sustained by the evidence, but allowed the libellant to recover the general average due from the vessel, although not claimed in the libel. Mr. Justice Curtis delivered the opinion of the court, which proceeded mainly on the grounds stated in the case of *The Clement*, *supra*. See also *Burton v. Salter*, U. S. C. C. Mass., 21 Law Rep. 148.

ciple, but according to the latest authority, the libellant can only recover according to the allegations in his libel, and that evidence is not admissible on points set up in the answer, which are not responsive to the libel, or which do not relate to some matter in discharge or avoidance of the case set up by the libel.<sup>1</sup>

If, in a cause of collision, the defendant sets up, in his answer, a particular thing as the cause of the collision, and fails to prove it, he is not, therefore, liable, for the libellant must make out his case, and must prove the defendant to be in fault.<sup>2</sup>

Although the language of a decree is such that, strictly construed, it could not be sustained on appeal, yet if it is obvious, from the subsequent parts of the record, that no error has been committed, the decree will not be reversed.<sup>3</sup>

When there is a cross action, which is heard by consent at the same time with the original action, the court may decide the cross action on the facts pleaded and proved in the original action.<sup>4</sup>

The circuit court, as we have seen, does not remit the case to the district court, but executes its own decrees.<sup>5</sup> The Supreme Court, however, remits the case to the circuit court, and by a mandate directs what disposition shall be made of the case.

<sup>1</sup> *McKinlay v. Morrish*, 21 How. 343. So, in equity, it has been held that no relief can be given, unless the complainant, by his allegations and proof, shows that he is entitled to relief, although the answer shows that he is. *Knox v. Smith*, 4 How. 298.

<sup>2</sup> *The East Lothian*, Lush. Adm. 241.

<sup>3</sup> *Sturgis v. Clough*, 1 Wallace, 269.

<sup>4</sup> *The Vortigern*, Swabey, Adm. 518.

<sup>5</sup> *Montgomery v. Anderson*, 21 How. 386. In *The Roarer*, 1 Blatchf. C. C. 1, the decree had been in favor of the libellants in the district court. Only one of the respondents appealed to the circuit court, and this appeal was afterwards dismissed as to some of the libellants, the sums severally awarded to them not being sufficient to justify the appeal. On the hearing, the decree of the district court was reversed, as between the appellant and those of the libellants who remained as appellees. The decree contained no provision as to so much of the decree below, as was not appealed from, and on motion being made to affirm it so far as it was not appealed from, Mr. Justice *Nelson* held, that the whole decree came up by the appeal, but as to that part not appealed from, it was not open to controversy, and the motion was denied.

## CHAPTER XVII.

## FINAL PROCESS.

THE old Twenty-First Admiralty Rule of the Supreme Court provided that "In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a *capias* and of a *fieri facias*, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for want thereof to arrest his body to answer the exigency of the execution. In all other cases the decree may be enforced by an attachment to compel the defendant to perform the decree; and upon such attachment the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the court."

In 1862, this rule was abolished, and the following rule substituted for it: "In all cases of a final decree for the payment of money, the libellant shall have a writ of execution in the nature of a *fieri facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulators."<sup>1</sup>

This rule seems more particularly applicable to suits *in personam*, for in suits *in rem* the process is a decree of sale, directing the marshal to sell the property and to pay the proceeds into court.

We have already considered the liability of stipulators,<sup>2</sup> and also whether a defendant or stipulator can be arrested if imprisonment for debt is abolished or modified in the State by the law of the State,<sup>3</sup> and only remark here that final process by arrest in any case seems to be taken away by the abolishment of the Twenty-First Rule and the passage of the new rule.

<sup>1</sup> 1 Black, 6.

<sup>2</sup> See *ante*, p. 414, 415.

<sup>3</sup> See *ante*, p. 388 - 390.

How far this rule is modified by the act of 1867, may perhaps be questionable.<sup>1</sup>

It was at one time doubted whether an execution could run against the land of the defendant or stipulator,<sup>2</sup> but this is now provided for by the rule above cited. It is provided by statute that judgment or decrees rendered after the fourth day of July, 1840, in the circuit and district courts of the United States within any State, "shall cease to be liens on real estate or chattels real in the same manner and at like periods as judgments and decrees of the courts of such State now cease by law to be liens thereon."<sup>3</sup>

Executions obtained for the use of the United States in any of the courts of the United States, in one State, may run and be executed in any other State, or in any of the Territories of the United States, but shall be issued from and made returnable to the court where the judgment was obtained.<sup>4</sup> And all writs of execution, upon any judgment or decree, obtained in any of the district or circuit courts of the United States, in any one State, which is or may be divided into two judicial districts may run and be executed in any part of such State, but shall be issued from, and be made returnable to the court where the judgment was obtained.<sup>5</sup>

Interest is allowed on all judgments in civil cases recovered in the circuit or district courts, in all cases where, by the law of the State in which the court is held, interest may be levied under process of execution on judgments recovered in the courts of such State, to be calculated from the date of the judgment, and at such rate per annum as is allowed by law on judgments recovered in the courts of such State.<sup>6</sup>

It seems hardly necessary to state that if the property sued *in rem* is not sufficient to pay the amount due, other property of the owner cannot be attached.<sup>7</sup>

<sup>1</sup> See *ante*, p. 389.

<sup>2</sup> See *ante*, p. 414.

<sup>3</sup> Act of 1840, c. 43, § 4, 5 U. S. Stats. at Large, 393.

<sup>4</sup> Act of 1797, c. 20, § 6, 1 U. S. Stats. at Large, 515.

<sup>5</sup> Act of 1826, c. 124, 4 U. S. Stats. at Large, 184.

<sup>6</sup> Act of 1842, c. 188, § 8, 5 U. S. Stats. at Large, 518.

<sup>7</sup> The Victor, Lush. Adm. 72.

## CHAPTER XVIII.

## OF APPEALS.

## SECTION I.

## OF APPEALS FROM THE DISTRICT TO THE CIRCUIT COURT.

THE act of 1789<sup>1</sup> provided, "That from final decrees in a district court in causes of admiralty and maritime jurisdiction, where the matter in dispute exceeds the sum or value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court to be held in such district."

The second section of the act of 1803<sup>2</sup> provides, "That from all final judgments or decrees, in any of the district courts of the United States, an appeal, where the matter in dispute, exclusive of costs, shall exceed the sum or value of fifty dollars, shall be allowed to the circuit court next to be holden in the district where such final judgment or judgments, decree or decrees may be rendered; and the circuit court or courts are hereby authorized and required to receive, hear, and determine such appeal."

This section then provides for an appeal from the circuit court to the Supreme, and after using the word "appeal" in the singular several time, provides "that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error; and that the said Supreme Court shall be and hereby is authorized and required to receive, hear, and determine such appeals."

The question is whether this clause applies to appeals from the district court to the circuit, and whether such appeals are subject to the rules prescribed for writs of error. If it were not for the last part of the preceding clause, it might well be argued that the

<sup>1</sup> Act of 1789, c. 20, § 21, 1 U. S. Stats. at Large, 83.

<sup>2</sup> Act of 1803, c. 40, § 2, 2 U. S. Stats. at Large, 244.

use of the word "appeal" in the singular, in speaking of an appeal from the district court to the circuit, and from the circuit to the Supreme Court, and then the use of the word "appeals" in the plural, showed conclusively that all appeals were to be subject to the rules prescribed for writs of error. The last part of the clause gives the Supreme Court jurisdiction over "such appeals." This cannot mean appeals from the district court to the circuit, but must be limited to appeals from the circuit to the Supreme Court, and hence it follows that the provision in regard to the rules prescribed for writs of error applies only to appeals from the circuit to the Supreme Court.

It is also to be noticed in confirmation of this view that under the act of 1789, only civil cases were taken from the district court to the circuit, by writs of error, while admiralty cases were taken from one court to the other by appeal.

The only effect then of the act of 1803 on the act of 1789, in regard to appeals to the circuit court is to reduce the sum or matter in controversy from three hundred to fifty dollars.<sup>1</sup>

In accordance with this view, it has been held that the appeal must be made to the next circuit court,<sup>2</sup> and that an appeal may properly be entered at the term of the circuit court which is begun next after the entry of the decree in the district court, although the term of the district court during which the decree was entered had not ended when the term of the circuit court began.<sup>3</sup>

This appeal must, unless there is a special rule of the court to the contrary, be taken in open court, and before the adjournment of the court without day.<sup>4</sup> But a party is not bound to appeal till the decree is regularly drawn up and entered, and if it is not drawn up till vacation, the court cannot have it entered as of the

<sup>1</sup> There is a *dictum* to this effect in *United States v. Nourse*, 6 Pet. 470, 496. On the authority of this *dictum* Mr. Justice Curtis, in *United States v. Certain Hogsheads of Molasses*, 1 Curtis, C. C. 276, said a question respecting an appeal from the district to the circuit court must depend on the construction of the 21st section of the Judiciary Act of 1789.

<sup>2</sup> *United States v. Brig Glamorgan*, 2 Curtis, C. C. 236.

<sup>3</sup> *United States v. Certain Hogsheads of Molasses*, 1 Curtis, C. C. 276.

<sup>4</sup> *Norton v. Rich*, 3 Mason, 443. The Forty-Fifth Admiralty Rule provides that "all appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules or by an order specially made in the particular case."



preceding term, but should continue it till the next term, as unfinished business.<sup>1</sup>

The Forty-Fifth Admiralty Rule allows, as we have seen, the district courts to provide rules for the regulation of the time of appeals, and also allows the court to make a special order in a particular case. By an old rule of the district court in Massachusetts, appeals might be claimed at any time within ten days after the decree was entered. The practice under this rule in the district court was to include Sundays within the ten days; but in one case, where the appeal was refused because not claimed within ten days including Sundays, Mr. Justice Woodbury, in the circuit court, held that it should have been allowed, and, on appeal, the Supreme Court were equally divided.<sup>2</sup> To settle the matter, the district court made a new rule in accordance with their former practice, including Sundays within the ten days.

Mr. Conkling is, however, of the opinion that the act of 1803, prescribing the rules applicable to writs of error, applies to appeals from the district to the circuit court;<sup>3</sup> and Mr. Justice Nelson, misled by Mr. Conkling, fell into the same mistake,<sup>4</sup> but afterwards retraced his steps.<sup>5</sup>

If the appellant deserts his appeal, the circuit court may remit the case to the district court, or may retain it and affirm the decree of the district court.<sup>6</sup>

If an appeal is wrongfully disallowed in the district court, the

<sup>1</sup> *Steamboat New England*, 3 Sumner, 495.

<sup>2</sup> *Reed v. Peck*, United States Sup. Ct. Dec. T. 1852. This case has never been reported.

<sup>3</sup> 2 Conkling, Adm. 2d ed. 397.

<sup>4</sup> *Hayford v. Griffith*, 3 Blatchf. C. C. 34.

<sup>5</sup> In *The Ellen*, 4 Blatchf. C. C. 107, it was held that no citation was required by these statutes in case of an appeal from the district to the circuit court; and that a written notice by the proctor of the appellant to the proctor of the adverse party was all the notice that was required by the rules of the court. *Nelson, J.*, said: "The 21st section of the Judiciary Act of 1789, provided for appeals in admiralty from the district court, but made no provision for a citation. This section was amended by the 2d section of the act of March 3, 1803, which reduced the amount necessary to the right of appeal, but made no change as to the mode of practice in bringing it. On a careful examination of that act, I am satisfied this is the true construction of the 2d section, so far as it applies to an appeal from the decree of the district court."

<sup>6</sup> *Privateer Montgomery, v. Schooner Betsey*, 1 Gallis. 416.

appellant may file a transcript of the record in the circuit court, and move the court for leave to enter the appeal,<sup>1</sup> or, if necessary in order to prevent the district court from carrying its decree into effect, he may apply to the circuit court for a mandamus, commanding the district court to allow the appeal. The writ of mandamus in such a case should be directed to the judge of the district court, and not to the clerk thereof.<sup>2</sup>

The duty of the clerk of the district court, and the manner of making up the record in case of an appeal, are set forth in the Fifty-Third Admiralty Rule, which we give in the Appendix.

## SECTION II.

### OF APPEALS FROM THE CIRCUIT TO THE SUPREME COURT.

The act of 1803,<sup>3</sup> which changed the mode of carrying up a suit in admiralty from the circuit to the Supreme Court, from a writ of error to an appeal,<sup>4</sup> provides that "such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error." This last clause has been held by the Supreme Court,<sup>5</sup> to have reference to the rules, etc., applicable to writs of error by the Judiciary Act.<sup>6</sup>

This act provides, generally, that a cause may be heard on writ of error in the Supreme Court, provided the party files an authenticated transcript of the record, and gives the adverse party thirty days' notice by a citation signed by a judge of the circuit court or justice of the Supreme Court. Writs of error must be brought within five years after the judgment complained of is rendered or passed, unless the person entitled to such writ is an infant, *feme*

<sup>1</sup> *The Enterprise*, 2 Curtis, C. C. 317.

<sup>2</sup> *The Steamboat New England*, 3 Sumner, 495. See *Smith v. Jackson*, 1 Paine, C. C. 453.

<sup>3</sup> Act of 1803, c. 40, § 2, 2 U. S. Stats. at Large, 244.

<sup>4</sup> *The San Pedro*, 2 Wheat, 132. The various questions growing out of the partial repeal of the judiciary act by the act of 1803, are discussed in this case at length; and the court held that an admiralty case could not, since the passage of the act of 1803, be taken up by a writ of error.

<sup>5</sup> *The San Pedro*, 2 Wheat, 132.

<sup>6</sup> Act of 1789, c. 20, §§ 22, 23, 1 U. S. Stats. at Large, 84.

*covert, non compos mentis*, or imprisoned, in all which cases five years are allowed exclusive of such disability. But in order to make the writ of error operate as a *supersedeas*, a copy must be lodged for the adverse party in the clerk's office,<sup>1</sup> where the record remains, within ten days,<sup>2</sup> Sundays exclusive, after the judgment is rendered, or the decree passed, which is complained of. And in any case where a writ of error may operate as a *supersedeas*, no execution shall issue during the ten days.

The judge signing the citation is required to take good and sufficient security that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his plea good.<sup>3</sup> As a general rule, to entitle the appeal to operate as a *supersedeas* the bond must be filed within the ten days.<sup>4</sup> The bond should mention the parties correctly.<sup>5</sup>

The word damages does not mean damages for the delay, but

<sup>1</sup> See *Wood v. Lide*, 4 Cranch, 180; *Davidson v. Lanier*, 4 Wallace, 454.

<sup>2</sup> *City of Washington v. Dennison*, 6 Wallace, 495. In *Thompson v. Voss*, 1 Cranch, C. C. 108, it was held that a writ of error was not a *supersedeas* unless it was served within ten days after the rendition of the judgment, although the parties had agreed to a stay of execution for two months, and the writ of error had been served before the expiration of that time. It would seem that an appeal must date from the time when it is actually made, and that an inferior court cannot give it any additional effect by allowing it to be entered *nunc pro tunc*. *Garrison v. Cass County*, 5 Wallace, 823; *The Roanoke*, 3 Blatchf. C. C. 390. And the same rule applies to the date of a decree. *Rubber Co. v. Goodyear*, 6 Wallace, 158.

<sup>3</sup> Act of 1789, c. 20, § 22, 1 U. S. Stats. at Large, 85. See *post*, 508, n. 4.

<sup>4</sup> *Adams v. Law*, 16 How. 144; *Hudgins v. Kemp*, 18 How. 530. In *Ex parte Milwaukee R.* 5 Wallace, 188, the bond was tendered within the ten days, but the judge refused to approve of it on the ground that all the sureties were non-residents of the district. The appeal to the Supreme Court was allowed, but not as a *supersedeas*. Application was then made to the Supreme Court for a *mandamus* to compel the judge to approve the bond and allow a *supersedeas*, or for such other relief as the court could give. The court held, that although they did not concur in the opinion of the judge below, that the fact of the non-residence of the sureties was a sufficient reason for rejecting the bond which was in other respects unobjectionable, they were not inclined to interfere by *mandamus* with the discretion of the judge in approving or rejecting a bond offered for his approval; but that as the case was properly before them they could issue a writ of *supersedeas*. It was accordingly ordered that on the filing of a bond within thirty days, to be approved by the clerk of the Supreme Court, a writ of *supersedeas* should issue.

<sup>5</sup> *Kail v. Wetmore*, 6 Wallace, 451.

the penalty must be sufficient to cover the whole amount of the judgment.<sup>1</sup> If a writ of error is not to operate as a *supersedeas*, the bond "shall be only to such an amount as, in the opinion of the justice or judge taking the same, shall be sufficient to answer all such costs as, upon an affirmance of the judgment or decree, may be adjudged or decreed to the respondent in error."<sup>2</sup>

The Thirty-Second Rule of the Supreme Court,<sup>3</sup> provides that *supersedeas* bonds in the circuit court must be taken, with good and sufficient security that the appellant shall prosecute his appeal to effect, and answer all damages and costs if he fail to make his appeal good. Such indemnity where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including "just damages for delay," and costs and interest on the appeal; but where the property is in the custody of the marshal, under admiralty process, as in case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use or detention of the property, and the costs of the suit, and "just damages for delay," and costs and interest on the appeal.

The question of the sufficiency of an appeal bond is to be determined in the first instance by the judge who signs the citation, but after the allowance of the appeal the Supreme Court can take cognizance of it.<sup>4</sup>

All the appellants should join in the appeal, though they need not join in the bond.<sup>5</sup>

The law presumes that the judge granting the appeal has attended to his duty, and it need not, therefore, appear affirmatively that the bond was given.<sup>6</sup> In one case, where the transcript

<sup>1</sup> *Stafford v. Union Bank of La.* 16 How. 135; *Catlett v. Brodie*, 9 Wheat. 553.

<sup>2</sup> Act of 1794, c. 3. 1 U. S. Stats. at Large, 404.

<sup>3</sup> 6 Wallace, iv.

<sup>4</sup> *Rubber Company v. Goodyear*. 6 Wallace, 153. *Chase*, C. J., said: "It is, therefore, matter of discretion with this court to increase or diminish the amount of the bond, and to require additional sureties, or otherwise, as justice may require."

<sup>5</sup> *Brockett v. Brockett*, 2 How. 238.

<sup>6</sup> *Martin v. Hunter*, 1 Wheat. 304, 361; *Davidson v. Lanier*, 4 Wallace, 454.

showed that no bond was given, the appeal was dismissed.<sup>1</sup> But the court will not always dismiss the appeal if no bond is filed, but will generally allow the appellants time within which to file it.<sup>2</sup> The bond must be taken and approved in such a case by any judge authorized to allow the appeal.<sup>3</sup>

If the inferior court issues an execution notwithstanding the appeal, the Supreme Court may issue a *supersedeas*, if the appellant was entitled to one in the inferior court.<sup>4</sup> But the appeal cannot operate as a *supersedeas* unless it is properly taken within the ten days. If, therefore, an appeal is taken and a bond filed, and the appeal is afterwards dismissed because of some informality in another respect, and then another appeal is taken and sufficient security offered, the appellant is not entitled to a *supersedeas*.<sup>5</sup>

If, after the decree is pronounced, the inferior court suspends the operation of it, as by entertaining a petition to open it, the ten days do not begin to run till the decree is finally entered.<sup>6</sup>

An appeal need not be in writing or taken in court.<sup>7</sup> If it is taken in open court, no citation is necessary.<sup>8</sup> If not taken in open court, a citation signed by the judge of the circuit court or by a justice of the Supreme Court must be issued,<sup>9</sup> citing the adverse party to appear at the Supreme Court on the first day of the next succeeding term;<sup>10</sup> and the appeal must be entered at that term.<sup>11</sup>

<sup>1</sup> *Boyce v. Grundy*, 6 Pet. 777.

<sup>2</sup> *Anson v. Blue Ridge R.* 23 How. 1. See also *Davidson v. Lanier*, 4 Wallace, 454; *Brobst v. Brobst*, 2 id. 96; *Seymour v. Freer*, 5 id. 822.

<sup>3</sup> *Anson v. Blue Ridge R.* 23 How. 1.

<sup>4</sup> *Stockton v. Bishop*, 2 How. 74.

<sup>5</sup> *Hogan v. Ross*. 11 How. 294.

<sup>6</sup> *Brockett v. Brockett*, 2 How. 238. See also *Wylie v. Coxe*, 14 How. 1.

<sup>7</sup> *Hudgins v. Kemp*, 18 How. 530, 537. In England the practice was formerly, after a party had appealed, for him to pray "apostles" from the judge, i. e. short letters dismissory, signed by the judge, stating shortly the case and sentence, etc. 2 Browne, Civ. & Adm. Law, 438. The word "apostles" is also used in one of the circuit court rules in New York, 1 Blatchf. C. C. 660.

<sup>8</sup> *Reily v. Lamar*, 2 Cranch, 344; *Brockett v. Brockett*, 2 How. 238.

<sup>9</sup> *City of Washington v. Dennison*, 6 Wallace, 495; *Alviso v. United States*, 5 Wallace, 824.

<sup>10</sup> *Insurance Co. v. Mordecai*, 21 How. 195; *United States v. Curry*, 6 How. 106. *Agricultural Company v. Pierce County*, 6 Wallace, 246.

<sup>11</sup> *Hamilton v. Moore*, 3 Dall. 371; *Villabolas v. United States*, 6 How. 81; *Steamer Virginia v. West*, 19 How. 182; *Mesa v. United States*, 2 Black, 721; *Castro v. United States*, 3 Wallace, 46; *Garrison v. Cass Co.* 5 id. 823. For a

To this rule there are, however, certain exceptions, which are thus stated by Mr. Justice Clifford: "Where the appellant, having seasonably procured the allowance of the appeal, is prevented from obtaining the transcript by the fraud of the other party, or by the order of the court, or by the contumacy of the clerk, the rule does not apply, provided it appears that the appellant was guilty of no laches, or want of diligence in his efforts to prosecute the appeal."<sup>1</sup>

If the appeal is taken after the commencement of the term of the Supreme Court, the appellant is not bound to file the record until the next term, and until the record is filed, the court cannot order the appeal to be dismissed.<sup>2</sup>

If the writ of error is defective, the Supreme Court of the United States has no power to amend it, or to issue another citation.<sup>3</sup>

The citation must be signed by the judge who allows the appeal and not by the clerk,<sup>4</sup> and it should name all the parties to the suit,<sup>5</sup> and name them correctly,<sup>6</sup> and it should be served before the commencement of the term,<sup>7</sup> and it has been said that if thirty

case where the writ was destroyed before reaching the Supreme Court, see *Mussina v. Cavazos*, 6 Wallace, 355. In *Insurance Co. v. Mordecai*, 21 How. 195, *Taney*, C. J., after stating that the writ must be returnable the first day of the term, said: the plaintiff in error "may, it is true, return the writ with the transcript at any time during the term, unless the case has been docketed and dismissed, when it cannot afterwards be filed without the special order of the court. But this permission to return the writ and file the transcript at a subsequent day, is upon the principle that, for certain purposes of convenience or justice, the term is considered as but one period of time, — as one day, and that day the first of the term."

<sup>1</sup> *United States v. Gomez*, 3 Wallace, 763.

<sup>2</sup> *Stafford v. Union Bank of Louisiana*, 16 How. 135.

<sup>3</sup> *Insurance Co. v. Mordecai*, 21 How. 195.

<sup>4</sup> *United States v. Hodge*, 3 How. 534; *Villabolas v. United States*, 6 How. 81, 90.

<sup>5</sup> *Smyth v. Strader*, 12 How. 327. In Louisiana, it is the practice for the name of the husband to be put in the petition when a suit is brought by the wife. This is done to signify the assent of the husband to the suit, but he is not considered a party to it, and is not responsible for costs. Under these circumstances it has been held that calling in the citation one of the parties A. B. wife of C. D., when she was wife of E. F., was not a fatal error. *Peale v. Phipps*, 8 How. 256.

<sup>6</sup> *Kail v. Wetmore*, 6 Wallace, 451.

<sup>7</sup> *Yeaton v. Lenox*, 7 Pet. 220; *Garrison v. Cass* Co. 5 Wallace, 823; *City of Washington v. Dennison*, 6 Wallace, 495.

days will not elapse before the commencement of the term, the respondent is not obliged to be ready for the argument before the thirty days have elapsed.<sup>1</sup> And in 1803, a rule was passed to this effect, but this rule was omitted in the new rules.<sup>2</sup> At the December Term, 1867, the Supreme Court provided that where final judgment is rendered more than thirty days before the first day of the next term of that court, the writ of error and citation, if taken before, must be returnable on the first day of said term, and be served before that day; but where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the term, and be served before that day.<sup>3</sup>

The citation should, we presume, be served personally, either on the appellee or his attorney of record, and the latter cannot, after the decision in the court below is given, withdraw his name to avoid service.<sup>4</sup> If the attorney of record is dead, it is not sufficient to serve it on his executor or personal representatives, or on another member of the bar who was a partner of the deceased, the name of the latter not appearing of record.<sup>5</sup> And in one case, where a woman married after judgment, it was held that the service of the citation upon her husband was sufficient.<sup>6</sup> The appellee should, if no citation is served upon him, or if one is served in any way irregularly, at the term when the appeal is entered, move that the appeal be dismissed, because if an appearance is entered

<sup>1</sup> *Lloyd v. Alexander*, 1 Cranch, 365. See also *Wood v. Lide*, 4 Cranch, 180. In *Welsh v. Mandeville*, 5 Cranch, 321, the court refused to take up a case without the consent of both parties, during the term, the citation not having been served thirty days before the commencement of the term.

<sup>2</sup> The 16th Rule, passed in 1803, 1 How. xxvi., provided that when the writ of error issued within thirty days before the meeting of the court, the defendant in error could enter his appearance and proceed to trial, otherwise the cause must be continued. The 9th Rule, of 1858, which provides for the manner of docketing and dismissing causes, which we give in the Appendix, makes no provision for this case, nor do any of the rules upon which it was founded. The old rules are revised and corrected in 21 How., and renumbered, but they are not expressly repealed, and the rule of 1803 may yet be in force.

<sup>3</sup> Rule No. 33, 6 Wallace, vi.

<sup>4</sup> *United States v. Curry*, 6 How. 106.

<sup>5</sup> *Bacon v. Hart*, 1 Black, 38.

<sup>6</sup> *Fairfax v. Fairfax*, 5 Cranch, 19.

for him, and no motion is made at that term, the irregularity will be considered as waived.<sup>1</sup>

The issue and service of the citation form no part of the record of the court below, and may be proved *aliunde*.<sup>2</sup>

Where the record states the appeal to have been made in open court, no evidence is admissible *dehors* the record to show the contrary, but the proper course is, if the record is incorrect or defective, to obtain a correct record on a *certiorari*.<sup>3</sup>

An appeal may be taken, as we have seen, at any time within five years, after the decree is rendered in the court below, and it has been held in the case of a writ of error that the writ must be filed in the Supreme Court before the expiration of that time, although it is issued from the circuit court in season.<sup>4</sup> Whether the same construction would apply to an appeal may perhaps be doubted; and in one case it was held that an appeal prayed for and allowed within five years was valid, although the security was not given until after that time, the mode of taking the security and of perfecting it being considered to be within the discretion of the court below.<sup>5</sup> If the suit is dismissed for any irregularity in the manner of taking the appeal, another appeal may be taken at any time within the five years;<sup>6</sup> but this appeal must be prosecuted at the term of the Supreme Court next succeeding such appeal.<sup>7</sup>

But if an appeal has been dismissed, the same case cannot be docketed again without another appeal.<sup>8</sup>

<sup>1</sup> McDonough v. Millaudon, 3 How. 693; Buckingham v. McLean, 13 How. 150.

<sup>2</sup> Innerarity v. Byrne, 5 How. 295. See also Hudgins v. Kemp, 18 How. 530, 537.

<sup>3</sup> Hudgins v. Kemp, 18 How. 530. To obtain a *certiorari* for a diminution of the record, a motion must be made in writing, and the facts on which it is founded must, if not admitted by the other party, be verified by affidavit. And all motions for *certiorari* must be made at the first term of the entry of the cause; otherwise the same will not be granted unless upon special cause shown to the court, satisfactorily accounting for the delay. Rule 14, 21 How. x.

<sup>4</sup> Brooks v. Norris, 11 How. 204.

<sup>5</sup> The Dos Hermanos, 10 Wheat. 306. It would seem from this case that the case could not have been entered in the Supreme Court until after the expiration of the five years. And we think it clear that an appeal taken any time within the five years is valid.

<sup>6</sup> Yeaton v. Lenox, 8 Pet. 123.

<sup>7</sup> Steamer Virginia v. West, 19 How. 182, per Taney, C. J.

<sup>8</sup> Rogers v. Law, 21 How. 526.



In the Supreme Court of the United States it has been held that where an appeal is not prosecuted in that court, it will be dismissed upon a certificate being produced from the circuit court that the appeal has been taken and not prosecuted.<sup>1</sup> This subject is now provided for by the Ninth Rule of court passed at the December term, 1858, which we give in the Appendix. This rule, which differs but little from the Forty-Third Rule, passed in 1835, and from the Sixty-Third Rule passed in 1853, provides that where a writ of error or an appeal is brought from a judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause and file the record with the clerk of the Supreme Court, within the first six days of the term;<sup>2</sup> and if the writ of error or appeal be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause, and file the record with the clerk of the Supreme Court within the first thirty days of the term. If the plaintiff in error fails to comply with this rule, the defendant in error or appellee may have it docketed and dismissed<sup>3</sup> upon producing a certificate from the clerk of the court wherein the judgment or decree was entered, stating the cause and certifying that such writ of error or appeal was duly sued out and allowed.<sup>4</sup>

<sup>1</sup> The Jonquille, 6 Wheat. 452.

<sup>2</sup> It was held under this rule in *Sparrow v. Strong*, 3 Wallace, 97, that if no motion to dismiss were previously made, the record might be filed by the appellant, and the cause docketed at any time within the term. The time in which the appellant must file the record is peremptory, and "can in no respect depend upon the convenience of the clerks of the inferior courts. *Sturges v. Harrold*, 18 How. 40. The counsel for the appellants in this case applied for an extension of time under the 63d Rule, and presented a certificate of the clerk of the circuit court to the effect that he could not consistently with the other duties of his office make out and have ready the transcripts of the records and proceedings within the time specified. The court refused to grant the motion.

<sup>3</sup> *United States v. Fremont*, 18 How. 30.

<sup>4</sup> The names of the parties must be stated in full, and it is not sufficient to say *Holliday et al. v. Batson et al.* *Holliday v. Batson*, 4 How. 645; *Smith v. Clark*, 12 How. 21. The certificate must also state specifically the day of the entry of the judgment or the decree, and it is not enough that the term is given, because the term may not have ended thirty days before the term of the Supreme Court commenced. *Rhodes v. Steamship Galveston*, 10 How. 144.

The plaintiff in error or appellant is not entitled to docket the cause and file the record after the same is docketed and dismissed under this rule unless by order of court.

The defendant in error or appellee may at his option docket the cause and file a copy of the record with the clerk of the court; and if the case is docketed, and a copy of the record filed with the clerk by the plaintiff or appellant within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee, at any time thereafter during the term, the case shall stand for argument at the term. Where writs of error and appeals are from California, Oregon, Washington, New Mexico, Utah, and Nevada, the period of thirty days is extended to sixty days.<sup>1</sup>

By the Thirty-First Rule of the Supreme Court<sup>2</sup> on the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the plaintiff in error or appellant is to be entered, and no motion to dismiss, except on special assignment by the court, is to be heard, unless previous notice has been given to the adverse party, or the counsel or attorney for such party.

Besides the bond given in the circuit court, the appellant is obliged to give to the clerk of the Supreme Court a bond with competent security to secure his fees, in the penalty of two hundred dollars, or a deposit of that amount to be placed in the bank subject to his draft.<sup>3</sup>

By a rule passed in 1823,<sup>4</sup> it was provided that no cause would

<sup>1</sup> In *German v. United States*, 5 Wallace, 825, on motion to dismiss an appeal from California, it appeared that the appeal was allowed on the 26th October, 1864, and the record was filed in the Supreme Court the 21st August, 1865. The court said: "This was too late. The record should have been brought and filed within the first sixty days of the next term of this court. This was not done, nor was the record returned within the term. The appeal, therefore, must be dismissed."

<sup>2</sup> 6 Wallace, v.

<sup>3</sup> Rule 10, 21 How. viii. In *Owings v. Tiernan*, 10 Pet. 24, a motion was made to docket the cause, and at the same time a motion was made to dismiss it because no bond was filed. The court allowed the cause to be docketed, and granted further time to the parties in which to file the bond. But if the bond is not filed at the first term, although the court will allow the cause to be entered at a subsequent term, yet they will not allow it to be entered as of the former term, although both parties consent to its being done. *Van Rensselaer v. Watts*, 7 How. 784. See *post*, p. 508, n. 4.

<sup>4</sup> 31st Rule, 1 How. xxxi.

be afterwards heard until a complete record, containing in itself, without references *aliunde*, all the papers, exhibits, depositions, and other proceedings which are necessary to the hearing in the Supreme Court, should be filed. By an act of 1853, it was declared that in equity and admiralty causes only such orders and memorandums as may be necessary to show the jurisdiction of the court and the regularity of the proceedings shall be entered on the final record; and in case of an appeal, copies of the proofs, and of such entries and papers on file as may be necessary on hearing of the appeal, may be certified up to the appellate court.<sup>1</sup> The rule of 1823 is, however, re-enacted by the eighth new rule of 1858.<sup>2</sup> Some other peculiarities of practice in the Supreme Court may be found in their general rules, which are printed in the 21st of Howard.

If both parties appeal to the Supreme Court, a transcript of the record filed in said court by either party on his appeal may be used on both appeals, and both appeals may be heard by the court in the same manner as if records had been filed by the appellants in both cases.<sup>3</sup>

In 1863 an act was passed providing that whenever any writ of error, appeal, or other process in law, admiralty, or equity should issue from or be brought up to the Supreme Court of the United States, either by the United States, or by direction of any department of the government thereof, no bond, obligation, or security should be required from the United States, or from any party acting under the direction aforesaid, by any judge or clerk of court, either to prosecute said suit or to answer in damages or costs. And that in case of an adverse decision, such costs as by law are taxable against the United States should be paid out of the contingent fund of the department under whose direction the proceeding was instituted.<sup>4</sup> In 1868 the provisions of this act were extended to writs of error, appeals, or other process in law, admiralty, or equity, issuing from or brought up to a circuit court of the United States.<sup>5</sup>

<sup>1</sup> Act of 1853, c. 80, § 1, 10 U. S. Stats. at Large, 163.

<sup>2</sup> 21 How. vii.

<sup>3</sup> Act of 1861, c. 61, 12 U. S. Stats. at Large, 319.

<sup>4</sup> Act of 1863, c. 50, 12 U. S. Stats. at Large, 657.

<sup>5</sup> Act of 1868, c. 255, 15 U. S. Stats. at Large, 226.

## **APPENDIX.**



## APPENDIX.

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Two modes of arranging these statutes and statutory provisions have been considered; one, to place them in the chronological order of their enactment; the other, to group them by their subjects, so that those which relate to the same matter may be found together. The latter method has obvious advantages, and has been given up only because it was found to be open to very serious objections. The most important of these arise from the fact that many provisions of great moment are intercalated in statutes where they have no legitimate place. For example, the enactment against flogging of seamen is contained — not in a separate section — but in a mere proviso, in an appropriation bill! This prevailing want of an arrangement by subjects in the statutes themselves makes it difficult to arrange them thus in this Appendix. And, upon the whole, it has seemed best to place them chronologically, and facilitate a reference to them, partly by a list, and much more by a full index of the matters in the Appendix, which will follow immediately after the General Index.

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### ACT OF 1789, CHAPTER 9 (1 U. S. Stats. at Large, 53).

#### *An Act concerning Pilots.*

SEC. 4. *And be it further enacted*, That all pilots in the bays, inlets, rivers, harbors, and ports of the United States shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively hereafter enact for the purpose, until further legislative provision shall be made by Congress.

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### ACT OF 1790, CHAPTER 9 (1 U. S. Stats. at Large, 112).

#### *An Act for the Punishment of certain Crimes against the United States.*

SEC. 8. *And be it further enacted*, That if any person or persons shall commit upon the high seas, in any river, haven, basin, or bay, out of the

jurisdiction of any particular State, murder or robbery, or any other offence which, if committed within the body of a county, would by the laws of the United States be punishable with death; or if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and being thereof convicted, shall suffer death; and the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular State, shall be in the district where the offender is apprehended, or into which he may first be brought.

SEC. 9. *And be it further enacted*, That if any citizen shall commit any piracy or robbery aforesaid, or any act of hostility against the United States, or any citizen thereof, upon the high sea, under color of any commission from any foreign prince, or state, or on pretence of authority from any person, such offender shall, notwithstanding the pretence of any such authority, be deemed, adjudged, and taken to be a pirate, felon, and robber, and on being thereof convicted, shall suffer death.

SEC. 10. *And be it further enacted*, That every person who shall, either upon the land or the seas, knowingly and wittingly aid and assist, procure, command, counsel, or advise any person or persons, to do or commit any murder or robbery, or other piracy aforesaid, upon the seas, which shall affect the life of such person, and such person or persons shall thereupon do or commit any such piracy or robbery, then all and every such person so as aforesaid aiding, assisting, procuring, commanding, counselling, or advising the same, either upon the land or the sea, shall be, and they are hereby declared, deemed, and adjudged to be accessory to such piracies before the fact, and every such person being thereof convicted shall suffer death.

SEC. 11. *And be it further enacted*, That after any murder, felony, robbery, or other piracy whatsoever aforesaid, is or shall be committed by any pirate or robber, every person who knowing that such pirate or robber has done or committed any such piracy or robbery, shall on the land or at sea receive, entertain, or conceal any such pirate or robber, or receive or take into his custody any ship, vessel, goods, or chattels, which have been by any such pirate or robber piratically and feloniously taken, shall be, and are hereby declared, deemed, and adjudged to be accessory to such piracy or robbery, after the fact; and on conviction thereof, shall be imprisoned not exceeding three years, and fined not exceeding five hundred dollars.

SEC. 12. *And be it further enacted*, That if any seaman or other person shall commit manslaughter upon the high seas, or confederate, or attempt, or endeavor to corrupt any commander, master, officer, or mariner, to yield up or to run away with any ship or vessel, or with any goods, wares, or merchandise, or to turn pirate, or to go over to or confederate with pirates, or in any wise trade with any pirate, knowing him to be such, or shall furnish such pirate with any ammunition, stores, or provisions of any kind, or shall fit out any vessel knowingly and with a design to trade with or supply or correspond with any pirate or robber upon the seas; or if any person or persons shall any ways consult, combine, confederate, or correspond with any pirate or robber on the seas, knowing him to be guilty of any such piracy or robbery; or if any seaman shall confine the master of any ship or other vessel, or endeavor to make a revolt in such ship; such person or persons so offending, and being thereof convicted, shall be imprisoned not exceeding three years, and fined not exceeding one thousand dollars.

SEC. 13. *And be it further enacted*, That if any person or persons, within any of the places upon the land under the sole and exclusive jurisdiction of the United States, or upon the high seas, in any vessel belonging to the United States, or to any citizen or citizens thereof, on purpose and of malice aforethought, shall unlawfully cut off the ear or ears, or cut out or disable the tongue, put out an eye, slit the nose, cut off the nose or a lip, or cut off or disable any limb or member of any person, with intention in so doing to maim or disfigure such person in any the manners before mentioned, then and in every such case the person or persons so offending, their counsellors, aiders, and abettors (knowing of and privy to the offence aforesaid) shall, on conviction, be imprisoned not exceeding seven years, and fined not exceeding one thousand dollars.

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ACT OF 1790, CHAPTER 29 (1 U. S. Stats. at Large, 131).

*An Act for the Government and Regulation of Seamen in the Merchant Service.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the first day of December next, every master or commander of any ship or vessel bound from a port in the United States to any foreign port, or of any ship or vessel of the burden of fifty tons or upwards, bound from a port in one State to a port in any other than an adjoining State, shall, before he proceed on such voyage, make an agreement, in writing or in



print, with every seaman or mariner on board such ship or vessel (except such as shall be apprentice or servant to himself or owners) declaring the voyage or voyages, term or terms of time, for which such seaman or mariner shall be shipped. And if any master or commander of such ship or vessel shall carry out any seaman or mariner (except apprentices or servants as aforesaid) without such contract or agreement being first made and signed by the seamen and mariners, such master or commander shall pay to every such seaman or mariner the highest price or wages which shall have been given at the port or place where such seaman or mariner shall have been shipped, for a similar voyage, within three months next before the time of such shipping: *Provided* such seaman or mariner shall perform such voyage: or if not, then for such time as he shall continue to do duty on board such ship or vessel; and shall moreover forfeit twenty dollars for every such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and such seaman or mariner, not having signed such contract, shall not be bound by the regulations, nor subject to the penalties and forfeitures, contained in this act.

SEC. 2. *And be it further enacted*, That at the foot of every such contract, there shall be a memorandum in writing, of the day and the hour on which such seaman or mariner, who shall so ship and subscribe, shall render themselves on board, to begin the voyage agreed upon. And if any such seaman or mariner shall neglect to render himself on board the ship or vessel, for which he has shipped, at the time mentioned in such memorandum, and if the master, commander, or other officer of the ship or vessel, shall, on the day on which such neglect happened, make an entry in the log-book of such ship or vessel, of the name of such seaman or mariner, and shall in like manner note the time that he so neglected to render himself (after the time appointed), every such seaman or mariner shall forfeit for every hour which he shall so neglect to render himself one day's pay, according to the rate of wages agreed upon, to be deducted out of his wages. And if any such seaman or mariner shall wholly neglect to render himself on board of such ship or vessel, or having rendered himself on board, shall afterwards desert and escape, so that the ship or vessel proceed to sea without him, every such seaman or mariner shall forfeit and pay to the master, owner, or consignee of the said ship or vessel, a sum equal to that which shall have been paid to him by advance at the time of signing the contract, over and besides the sum so advanced, both which sums shall be recoverable in any court, or before any justice or justices of any State, city, town, or county within the United States, which, by the laws thereof, have cognizance of debts of equal value, against such seaman or mariner, or his surety or sureties, in case he shall have given surety to proceed the voyage.

SEC. 3. *And be it further enacted*, That if the mate or first officer under the master, and a majority of the crew of any ship or vessel, bound on a voyage to any foreign port, shall, after the voyage is begun (and before the ship or vessel shall have left the land) discover that the said ship or vessel is too leaky, or is otherwise unfit in her crew, body, tackle, apparel, furniture, provisions, or stores, to proceed on the intended voyage, and shall require such unfitness to be inquired into, the master or commander shall, upon the request of the said mate (or other officer) and such majority, forthwith proceed to or stop at the nearest or most convenient port or place where such inquiry can be made, and shall there apply to the judge of the district court, if he shall there reside, or if not, to some justice of the peace of the city, town, or place, taking with him two or more of the said crew who shall have made such request; and thereupon such judge or justice is hereby authorized and required to issue his precept directed to three persons in the neighborhood, the most skilful in maritime affairs that can be procured, requiring them to repair on board such ship or vessel, and to examine the same in respect to the defects and insufficiencies complained of, and to make report to him the said judge or justice, in writing under their hands, or the hands of two of them, whether in any, or in what respect the said ship or vessel is unfit to proceed on the intended voyage, and what addition of men, provisions, or stores, or what repairs or alterations in the body, tackle, or apparel will be necessary; and upon such report the said judge or justice shall adjudge and determine, and shall indorse on the said report his judgment, whether the said ship or vessel is fit to proceed on the intended voyage; and if not, whether such repairs can be made or deficiencies supplied where the ship or vessel then lays, or whether it be necessary for the said ship or vessel to return to the port from whence she first sailed, to be there refitted; and the master and crew shall in all things conform to the said judgment; and the master or commander shall, in the first instance, pay all the costs of such view, report, and judgment, to be taxed and allowed on a fair copy thereof, certified by the said judge or justice. But if the complaint of the said crew shall appear upon the said report and judgment to have been without foundation, then the said master, or the owner, or consignee of such ship or vessel, shall deduct the amount thereof, and of reasonable damages for the detention (to be ascertained by the said judge or justice) out of the wages growing due to the complaining seamen or mariners. And if, after such judgment, such ship or vessel is fit to proceed on her intended voyage, or after procuring such men, provisions, stores, repairs, or alterations as may be directed, the said seamen or mariners, or either of them, shall refuse to proceed on the voyage, it shall and may be lawful for any justice of the peace to commit by warrant under his hand and seal every such seaman or

mariner (who shall so refuse) to the common gaol of the county, there to remain without bail or main prize, until he shall have paid double the sum advanced to him at the time of subscribing the contract for the voyage, together with such reasonable costs as shall be allowed by the said justice, and inserted in the said warrant, and the surety or sureties of such seaman or mariner (in case he or they shall have given any) shall remain liable for such payment; nor shall any such seaman or mariner be discharged upon any writ of habeas corpus or otherwise, until such sum be paid by him or them, or his or their surety or sureties, for want of any form of commitment, or other previous proceedings. *Provided*, That sufficient matter shall be made to appear, upon the return of such habeas corpus, and an examination then to be had, to detain him for the causes hereinbefore assigned.

SEC. 4. *And be it further enacted*, That if any person shall harbor or secrete any seaman or mariner belonging to any ship or vessel, knowing them to belong thereto, every such person, on conviction thereof before any court in the city, town, or county where he, she, or they may reside, shall forfeit and pay ten dollars for every day which he, she, or they shall continue so to harbor or secrete such seaman or mariner, one half to the use of the person prosecuting for the same, the other half to the use of the United States; and no sum exceeding one dollar shall be recoverable from any seaman or mariner by any one person, for any debt contracted during the time such seaman or mariner shall actually belong to any ship or vessel, until the voyage for which such seaman or mariner engaged shall be ended.

SEC. 5. *And be it further enacted*, That if any seaman or mariner, who shall have subscribed such contract as is herein before described, shall absent himself from on board the ship or vessel in which he shall so have shipped, without leave of the master or officer commanding on board; and the mate, or other officer having charge of the log-book, shall make an entry therein of the name of such seaman or mariner, on the day on which he shall so absent himself, and if such seaman or mariner shall return to his duty within forty-eight hours, such seaman or mariner shall forfeit three days' pay for every day which he shall so absent himself, to be deducted out of his wages; but if any seaman or mariner shall absent himself for more than forty-eight hours at one time, he shall forfeit all the wages due to him, and all his goods and chattels which were on board the said ship or vessel, or in any store where they may have been lodged at the time of his desertion, to the use of the owners of the ship or vessel, and moreover shall be liable to pay to him or them all damages which he or they may sustain by being obliged to hire other seamen or mariners in his or their place, and such damages shall be recovered with costs, in

any court or before any justice or justices having jurisdiction of the recovery of debts to the value of ten dollars or upwards.

SEC. 6. *And be it further enacted,* That every seaman or mariner shall be entitled to demand and receive from the master or commander of the ship or vessel to which they belong one third part of the wages which shall be due to him at every port where such ship or vessel shall unlade and deliver her cargo before the voyage be ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and the cargo or ballast be fully discharged at the last port of delivery, every seaman or mariner shall be entitled to the wages which shall be then due according to his contract; and if such wages shall not be paid within ten days after such discharge, or if any dispute shall arise between the master and seamen or mariners touching the said wages, it shall be lawful for the judge of the district where the said ship or vessel shall be, or in case his residence be more than three miles from the place, or of his absence from the place of his residence, then, for any judge or justice of the peace, to summon the master of such ship or vessel to appear before him, to show cause why process should not issue against such ship or vessel, her tackle, furniture, and apparel, according to the course of admiralty courts, to answer for the said wages: and if the master shall neglect to appear, or appearing, shall not show that the wages are paid, or otherwise satisfied or forfeited, and if the matter in dispute shall not be forthwith settled, in such case the judge or justice shall certify to the clerk of the court of the district, that there is sufficient cause of complaint whereon to found admiralty process, and thereupon the clerk of such court shall issue process against the said ship or vessel, and the suit shall be proceeded on in the said court, and final judgment be given according to the course of admiralty courts in such cases used; and in such suit all the seamen or mariners (having cause of complaint of the like kind against the same ship or vessel) shall be joined as complainants; and it shall be incumbent on the master or commander to produce the contract and log-book, if required, to ascertain any matters in dispute; otherwise the complainants shall be permitted to state the contents thereof, and the proof of the contrary shall lie on the master or commander; but nothing herein contained shall prevent any seaman or mariner from having or maintaining any action at common law for the recovery of his wages, or from immediate process out of any court having admiralty jurisdiction, wherever any ship or vessel may be found, in case she shall have left the port of delivery where her voyage ended, before payment of the wages, or in case she shall be about to proceed to sea before the end of the ten days next after the delivery of her cargo or ballast.

SEC. 7. *And be it further enacted*, That if any seaman or mariner, who shall have signed a contract to perform a voyage, shall, at any port or place, desert, or shall absent himself from such ship or vessel, without leave of the master, or officer commanding in the absence of the master, it shall be lawful for any justice of peace within the United States (upon the complaint of the master) to issue his warrant to apprehend such deserter, and bring him before such justice; and if it shall then appear, by due proof, that he has signed a contract within the intent and meaning of this act, and that the voyage agreed for is not finished, altered, or the contract otherwise dissolved, and that such seaman or mariner has deserted the ship or vessel, or absented himself without leave, the said justice shall commit him to the house of correction or common jail of the city, town, or place, there to remain until the said ship or vessel shall be ready to proceed on her voyage, or till the master shall require his discharge, and then to be delivered to the said master, he paying all the cost of such commitment, and deducting the same out of the wages due to such seaman or mariner.

SEC. 8. *And be it further enacted*, That every ship or vessel belonging to a citizen or citizens of the United States, of the burden of one hundred and fifty tons or upwards, navigated by ten or more persons in the whole, and bound on a voyage without the limits of the United States, shall be provided with a chest of medicines, put up by some apothecary of known reputation, and accompanied by directions for administering the same; and the said medicines shall be examined by the same or some other apothecary, once at least in every year, and supplied with fresh medicines in the place of such as shall have been used or spoiled; and in default of having such medicine-chest so provided, and kept fit for use, the master or commander of such ship or vessel shall provide and pay for all such advice, medicine, or attendance of physicians, as any of the crew shall stand in need of in case of sickness, at every port or place where the ship or vessel may touch or trade at during the voyage, without any deduction from the wages of such sick seaman or mariner.

SEC. 9. *And be it further enacted*, That every ship or vessel, belonging as aforesaid, bound on a voyage across the Atlantic Ocean, shall, at the time of leaving the last port from whence she sails, have on board, well secured under deck, at least sixty gallons of water, one hundred pounds of salted flesh meat, and one hundred pounds of wholesome ship-bread, for every person on board such ship or vessel, over and besides such other provisions, stores, and live-stock as shall by the master or passengers be put on board, and in like proportion for shorter or longer voyages; and in case the crew of any ship or vessel, which shall not have been so provided, shall be put upon short allowance in water, flesh, or bread,

during the voyage, the master or owner of such ship or vessel, shall pay to each of the crew, one day's wages beyond the wages agreed on, for every day they shall be so put to short allowance, to be recovered in the same manner as their stipulated wages.

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ACT OF 1792, CHAPTER 24 (1 U. S. Stats. at Large, 254).

*An Act concerning Consuls and Vice-Consuls.*

For carrying into full effect the convention between the King of the French, and the United States of America, entered into for the purpose of defining and establishing the functions and privileges of their respective consuls and vice-consuls:—

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That where in the seventh article of the said convention, it is agreed that when there shall be no consul or vice-consul of the King of the French, to attend to the saving of the wreck of any French vessels stranded on the coasts of the United States, or that the residence of the said consul, or vice-consul (he not being at the place of the wreck) shall be more distant from the said place than that of the competent judge of the country, the latter shall immediately proceed to perform the office therein prescribed; the district judge of the United States of the district in which the wreck shall happen shall proceed therein, according to the tenor of the said article. And in such cases it shall be the duty of the officers of the customs within whose districts such wrecks shall happen, to give notice thereof, as soon as may be, to the said judge, and to aid and assist him to perform the duties hereby assigned to him. The district judges of the United States shall also, within their respective districts, be the competent judges, for the purposes expressed in the ninth article of the said convention, and it shall be incumbent on them to give aid to the consuls and vice-consuls of the King of the French, in arresting and securing deserters from vessels of the French nation according to the tenor of the said article.

And where by any article of the said convention, the consuls and vice-consuls of the King of the French, are entitled to the aid of the competent executive officers of the country, in the execution of any precept, the marshals of the United States and their deputies shall, within their respective districts, be the competent officers, and shall give their aid according to the tenor of the stipulations.

And whenever commitments to the jails of the country shall become

necessary in pursuance of any stipulation of the said convention, they shall be to such jails within the respective districts as other commitments under the authority of the United States are by law made.

And for the direction of the consuls and vice-consuls of the United States in certain cases.

SEC. 2. *Be it enacted by the authority aforesaid,* That they shall have right in the ports or places to which they are or may be severally appointed of receiving the protests or declarations, which such captains, masters, crews, passengers, and merchants, as are citizens of the United States, may respectively choose to make there; and also such as any foreigner may choose to make before them relative to the personal interest of any citizens of the United States; and the copies of the said acts duly authenticated by the said consuls or vice-consuls, under the seal of their consulates, respectively, shall receive faith in law, equally as their originals would in all courts in the United States. It shall be their duty, where the laws of the country permit, to take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any ship or vessel who shall die within their consulate; leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects, they shall inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice; shall collect the debts due to the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted; shall sell at auction after reasonable public notice, such part of the estate as shall be of a perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and at the expiration of one year from his decease, the residue; and the balance of the estate they shall transmit to the treasury of the United States, to be holden in trust for the legal claimants. But if at any time before such transmission, the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees, and shall cease their proceedings. [See Act of 1856, c. 127, § 29.]

For the information of the representative of the deceased, it shall be the duty of the consul or vice-consul authorized to proceed as aforesaid in the settlement of his estate, immediately to notify his death in one of the gazettes published in the consulate, and also to the Secretary of State, that the same may be notified in the State to which the deceased shall belong; and he shall also, as soon as may be, transmit to the Secretary of State, an inventory of the effects of the deceased, taken as before directed.

SEC. 3. *And be it further enacted,* That the said consuls and vice-con-

suls, in cases where ships or vessels of the United States shall be stranded on the coasts of their consulates respectively, shall, as far as the laws of the country will permit, take proper measures, as well for the purpose of saving the said ships or vessels, their cargoes and appurtenances, as for storing and securing the effects and merchandise saved, and for taking an inventory or inventories thereof; and the merchandise and effects saved with the inventory or inventories thereof taken as aforesaid, shall, after deducting therefrom the expense, be delivered to the owner or owners. *Provided*, That no consul or vice-consul shall have authority to take possession of any such goods, wares, merchandise, or other property, when the master, owner, or consignee thereof is present or capable of taking possession of the same.

SEC. 4. *And be it further enacted*, That it shall and may be lawful for every consul and vice-consul of the United States, to take and receive the following fees of office for the services which he shall have performed.

For authenticating under the consular seal, every protest, declaration, deposition, or other act, which such captains, masters, mariners, seamen, passengers, merchants, or others as are citizens of the United States, may respectively choose to make, the sum of two dollars.

For the taking into possession, inventorying, selling, and finally settling and paying, or transmitting as aforesaid, the balance due on the personal estate left by any citizen of the United States who shall die within the limits of his consulate, five per centum on the gross amount of such estate.

For taking into possession and otherwise proceeding on any such estate which shall be delivered over to the legal representatives before a final settlement of the same, as is hereinbefore directed, two and an half per centum on such part delivered over as shall not be in money, and five per centum on the gross amount of the residue.

And it shall be the duty of the consuls and vice-consuls of the United States to give receipts for all fees which they shall receive by virtue of this act, expressing the particular services for which they are paid.

SEC. 5. *And be it further enacted*, That in case it be found necessary for the interest of the United States, that a consul or consuls be appointed to reside on the coast of Barbary, the President be authorized to allow an annual salary, not exceeding two thousand dollars to each person so to be appointed: *Provided*, That such salary be not allowed to more than one consul for any one of the States on the said coast.

SEC. 6. *And be it further enacted*, That every consul and vice-consul shall, before they enter on the execution of their trusts, or if already in the execution of the same, within one year from the passing of this act, or if resident in Asia, within two years, give bond with such sureties as



shall be approved by the Secretary of State, in a sum of not less than two thousand nor more than ten thousand dollars, conditioned for the true and faithful discharge of the duties of his office according to law, and also for truly accounting for all moneys, goods, and effects which may come into his possession by virtue of this act; and the said bond shall be lodged in the office of the Secretary of the Treasury.

Sections 7 and 8. [Repealed, Act of 1803, c. 9, § 5.]

SEC. 9. *And be it further enacted*, That the specification of certain powers and duties, in this act, to be exercised or performed by the consuls and vice-consuls of the United States, shall not be construed to the exclusion of others resulting from the nature of their appointments, or any treaty or convention under which they may act.

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ACT OF 1792, CHAPTER 1 (1 U. S. Stats. at Large, 287).

*An Act concerning the Registering and Recording of Ships or Vessels.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That ships or vessels, which shall have been registered by virtue of the act, entitled "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," and those which, after the last day of March next, shall be registered, pursuant to this act, and no other (except such as shall be duly qualified, according to law, for carrying on the coasting trade and fisheries, or one of them) shall be denominated and deemed ships or vessels of the United States, entitled to the benefits and privileges appertaining to such ships or vessels: *Provided*, That they shall not continue to enjoy the same, longer than they shall continue to be wholly owned, and to be commanded by a citizen or citizens of the said States.

SEC. 2. *And be it further enacted*, That ships or vessels built within the United States, whether before or after, the fourth of July, one thousand seven hundred and seventy-six, and belonging wholly to a citizen or citizens thereof, or not built within the said States, but on the sixteenth day of May, in the year one thousand seven hundred and eighty-nine, belonging and thenceforth continuing to belong to a citizen or citizens thereof, and ships or vessels which may hereafter be captured in war, by such citizen or citizens, and lawfully condemned as prize, or which have been, or may be adjudged to be forfeited for a breach of the laws of the United States, being wholly owned by a citizen or citizens thereof, and no other, may be registered as hereinafter directed: *Provided*, That no such ship or vessel shall be entitled to be so registered, or if registered, to the bene-

fits thereof, if owned in whole, or in part, by any citizen in the United States, who usually resides in a foreign country, during the continuance of such residence, unless such citizen be in the capacity of a consul of the United States, or an agent for, and a partner in, some house of trade or copartnership, consisting of citizens of the said States actually carrying on trade within the said States: *And provided further*, That no ship or vessel, built within the United States, prior to the said sixteenth day of May, which was not then owned wholly, or in part, by a citizen or citizens of the United States, shall be capable of being registered, by virtue of any transfer to a citizen or citizens, which may hereafter be made, unless by way of prize or forfeiture: *Provided nevertheless*, That this shall not be construed to prevent the registering anew of any ship or vessel, which was before registered, pursuant to the act before mentioned.

SEC. 3. *And be it further enacted*, That every ship or vessel, hereafter to be registered (except as is hereinafter provided) shall be registered by the collector of the district in which shall be comprehended the port to which such ship or vessel shall belong, at the time of her registry, which port shall be deemed to be that, at or nearest to which, the owner, if there be but one, or if more than one, the husband, or acting and managing owner of such ship or vessel, usually resides. And the name of the said ship or vessel, and of the port to which she shall so belong, shall be painted on her stern, on a black ground, in white letters, of not less than three inches in length. And if any ship or vessel of the United States shall be found, without having her name, and the name of the port to which she belongs, painted in manner aforesaid, the owner or owners shall forfeit fifty dollars; one half to the person giving the information thereof, the other half to the use of the United States.<sup>1</sup>

SEC. 4. *And be it further enacted*, That, in order to the registry of any ship or vessel, an oath or affirmation shall be taken and subscribed by the owner, or by one of the owners thereof, before the officer authorized to make such registry, who is hereby empowered to administer the same, declaring, according to the best of the knowledge and belief of the person so swearing or affirming, the name of such ship or vessel, her burden, the place where she was built, if built within the United States, and the year in which she was built; and if built within the United States, before the said sixteenth day of May, one thousand seven hundred and eighty-nine, that she was then owned wholly, or in part, by a citizen or citizens of the United States; and if not built within the said States, that she was, on the said sixteenth day of May, and ever since, hath continued to be, the entire property of a citizen or citizens of the United States; or that she was, at some time posterior to the time when the act shall take effect (specify

<sup>1</sup> See act of 1864, c. 78.

ing the said time), captured in war by a citizen or citizens of the said States, and lawfully condemned as prize (producing a copy of the sentence of condemnation, authenticated in the usual form) or that she has been adjudged to be forfeited for a breach of the laws of the United States (producing a like copy of the sentence whereby she shall have been so adjudged), and declaring his or her name and place of abode, and if he or she be the sole owner of the said ship or vessel that such is the case; or if there be another owner or other owners, that there is or are such other owner or owners, specifying his, her, or their name or names, and place or places of abode, and that he, she, or they, as the case may be, so swearing or affirming, is or are citizens of the United States; and where an owner resides in a foreign country, in the capacity of a consul of the United States, or as an agent for, and a partner in, a house or copartnership, consisting of citizens of the United States, and actually carrying on trade within the United States, that such is the case, and that there is no subject or citizen of any foreign prince or state, directly, or indirectly, by way of trust, confidence, or otherwise, interested in such ship or vessel, or in the profits, or issues thereof; and that the master, or commander thereof is a citizen, naming the said master, or commander, and stating the means whereby, or manner in which, he is so a citizen. And in case any of the matters of fact, in the said oath or affirmation alleged, which shall be within the knowledge of the party so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture, and apparel, in respect to which, the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person, by whom such oath or affirmation shall have been made: *Provided always*, That if the master, or person having the charge or command of such ship or vessel, shall be within the district aforesaid, when application shall be made for registering the same, he shall, himself, make oath, or affirmation, instead of the said owner, touching his being a citizen, and the means whereby, or manner in which, he is so a citizen; in which case, if what the said master, or person having the said charge or command, shall so swear or affirm, shall not be true, the forfeiture aforesaid shall not be incurred, but he shall, himself, forfeit and pay, by reason thereof, the sum of one thousand dollars: *And provided further*, That in the case of a ship or vessel, built within the United States prior to the sixteenth day of May aforesaid, which was not then owned by a citizen or citizens of the United States, but which, by virtue of a transfer to such citizen or citizens, shall have been registered, pursuant to the act before mentioned, the oath or affirmation, hereby required, shall and may be varied, according to the truth of the case, as often as it shall be requisite to grant a new register for such ship or vessel.

SEC. 5. [Repealed, Act of 1868, c. 137.]

SEC. 6. *And be it further enacted*, That before any ship or vessel shall be registered, she shall be measured by a surveyor, if there be one, or by the person he shall appoint, at the port or place where the said ship or vessel may be, and if there be none, by such person as the collector of the district, within which she may be, shall appoint, according to the rule prescribed by the forty-third section of the act, intituled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares, and merchandise imported into the United States, and on the tonnage of ships or vessels." And the officer, or person, by whom such admeasurement shall be made, shall, for the information of, and as a voucher to, the officer by whom the registry is to be made, grant a certificate, specifying the built of such ship or vessel, her number of decks and masts, her length, breadth, depth, the number of tons she measures, and such other particulars as are usually descriptive of the identity of a ship or vessel; and that her name, and the place to which she belongs, are painted on her stern, in manner required by the third section of this act; which certificate shall be countersigned by an owner, or by the master of such ship or vessel, or by some other person who shall attend her admeasurement, on behalf of her owner or owners, in testimony of the truth of the particulars therein contained; without which, the said certificate shall not be valid. But in all cases, where a ship or vessel has before been registered, as a ship or vessel of the United States, it shall not be necessary to measure her anew, for the purpose of obtaining another register; except such ship or vessel shall have undergone some alteration, as to her burden, subsequent to the time of her former registry.

SEC. 7. *And be it further enacted*, That, previous to the registry of any ship or vessel, the husband or acting and managing owner, together with the master thereof, and one or more sureties, to the satisfaction of the collector of the district, whose duty it is to make such registry, shall become bound to the United States, if such ship or vessel shall be of burden not exceeding fifty tons, in the sum of four hundred dollars; if of burden above fifty tons, and not exceeding one hundred, in the sum of eight hundred dollars; if of burden above one hundred tons, and not exceeding two hundred, in the sum of twelve hundred dollars; if of burden above two hundred tons, and not exceeding three hundred, in the sum of sixteen hundred dollars; and if of burden exceeding three hundred tons, in the sum of two thousand dollars; with condition, in each case, that the certificate of such registry shall be solely used for the ship or vessel for which it is granted, and shall not be sold, lent, or otherwise disposed of to any person or persons whomsoever; and that, in case such ship or vessel shall be lost, or taken by an enemy, burnt, or broken up, or shall

be otherwise prevented from returning to the port to which she may belong, the said certificate, if preserved, shall be delivered up, within eight days after the arrival of the master, or person, having the charge or command of such ship or vessel, within any district of the United States to the collector of such district, and that if any foreigner, or any person or persons, for the use and benefit of such foreigner, shall purchase, or otherwise become entitled to the whole, or any part or share of, or interest in, such ship or vessel, the same being within a district of the United States, the said certificate shall, in such case, within seven days after such purchase, change, or transfer of property, be delivered up to the collector of the said district; and that if any such purchase, change, or transfer of property, shall happen, when such ship or vessel shall be at any foreign port or place, or at sea, then the said master, or person having the charge or command thereof, shall, within eight days after his arrival within any district of the United States, deliver up the said certificate to the collector of such district; and every such certificate, so delivered up, shall be forthwith transmitted to the register of the treasury, to be cancelled, who, if the same shall have been delivered up to a collector, other than of the district in which it was granted, shall cause notice of such delivery to be given to the collector of the said district.

SEC. 8. *And be it further enacted*, That in order to the registry of any ship or vessel, which, after the last day of March next, shall be built within the United States, it shall be necessary to produce a certificate, under the hand of the principal or master carpenter, by whom, or under whose direction, the said ship or vessel shall have been built, testifying that she was built by him, or under his direction, and specifying the place where, the time when, and the person or persons for whom, and describing her built, number of decks and masts, length, breadth, depth, tonnage, and such other circumstances as are usually descriptive of the identity of a ship or vessel; which certificate shall be sufficient to authorize the removal of a new vessel, from the district where she may be built, to another district in the same, or an adjoining State, where the owner or owners actually reside, provided it be with ballast only.

SEC. 9. *And be it further enacted*, That the several matters hereinbefore required, having been complied with, in order to the registering of any ship or vessel, the collector of the district, comprehending the port to which she shall belong, shall make, and keep, in some proper book, a record or registry thereof, and shall grant an abstract or certificate of such record or registry, as nearly as may be, in the form following: —

“In pursuance of an Act of the Congress of the United States of America, intituled ‘An act concerning the registering and recording of ships or vessels,’ [inserting here the name, occupation, and place of abode

of the person by whom the oath, or affirmation aforesaid, shall have been made] having taken or subscribed the oath (or affirmation) required by the said act, and having sworn (or affirmed) that he (or she, and if more than one owner, adding the words, 'together with,' and the name or names, occupation or occupations, place or places of abode, of the other owner or owners) is (or are) the only owner (or owners) of the ship or vessel, called the [inserting here her name] of [inserting here the port to which she may belong] whereof [inserting here the name of the master] is at present master, and is a citizen of the United States, and that the said ship or vessel was [inserting here when and where built] and [inserting here the name and office, if any, of the person by whom she shall have been surveyed or admeasured] having certified that the said ship or vessel has [inserting here the number of decks] and [inserting here the number of masts] and that her length is [inserting here the number of feet] her breadth [inserting here the number of feet] her depth [inserting here the number of feet] and that she measures [inserting here her number of tons] that she is [describing here the particular kind of vessel, whether ship, brigantine, snow, schooner, sloop, or whatever else, together with her built, and specifying whether she has any, or no gallery or head] and the said [naming the owner, or the master, or other person, acting in behalf of the owner or owners, by whom the certificate of admeasurement shall have been countersigned, as aforesaid] having agreed to the description and admeasurement, above specified, and sufficient security having been given, according to the said act, the said ship or vessel has been duly registered at the port of [naming the port where registered]. Given under my hand and seal, at [naming the said port] this [inserting the particular day] day of [naming the month] in the year [specifying the number of the year, in words at length"]: *Provided*, That if the master, or person having the charge or command of such ship or vessel, shall, himself, have made oath or affirmation touching his being a citizen, the wording of the said certificate shall be varied so as to be conformable to the truth of the case: *And provided*, That where a new certificate of registry is granted, in consequence of any transfer of a ship or vessel, the words shall be so varied as to refer to the former certificate of registry, for her admeasurement.

SEC. 10. *And be it further enacted*, That it shall be the duty of the Secretary of the Treasury to cause to be prepared, and transmitted, from time to time, to the collectors of the several districts, a sufficient number of forms of the said certificates of registry, attested under the seal of the treasury, and the hand of the register thereof, with proper blanks, to be filled by the said collectors, respectively, by whom, also, the said certificates shall be signed and sealed, before they shall be issued; and where

there is a naval officer at any port, they shall be countersigned by him; and where there is a surveyor, but no naval officer, they shall be countersigned by him; and a copy of each shall be transmitted to the said register, who shall cause a record to be kept of the same.

SEC. 11. *And be it further enacted*, That where any citizen or citizens of the United States, shall purchase, or become owner or owners of any ship or vessel, entitled to be registered, by virtue of this act, such ship or vessel, being within any district, other than the one, in which he or they usually reside, such ship or vessel shall be entitled to be registered by the collector of the district, where such ship or vessel may be, at the time of his or their becoming owner or owners thereof, upon his or their complying with the provisions hereinbefore prescribed, in order to the registry of ships or vessels; and the oath or affirmation which is required to be taken, may, at the option of such owner or owners, be taken, either before the collector of the district, comprehending the port to which such ship or vessel may belong, or before the collector of the district, within which, such ship or vessel may be, either of whom is hereby empowered to administer the same: *Provided nevertheless*, That whenever such ship or vessel shall arrive within the district comprehending the port to which such ship or vessel shall belong, the certificate of registry, which shall have been obtained, as aforesaid, shall be delivered up to the collector of such district, who, upon the requisites of this act, in order to the registry of ships or vessels, being complied with, shall grant a new one, in lieu of the first; and the certificate, so delivered up, shall forthwith be returned by the collector who shall receive the same, to the collector who shall have granted it; and if the said first-mentioned certificate of registry shall not be delivered up, as above directed, the owner or owners, and the master of such ship or vessel, at the time of her said arrival within the district comprehending the port to which such ship or vessel may belong, shall, severally, forfeit the sum of one hundred dollars, to be recovered with costs of suit; and the said certificate of registry shall be thenceforth void. And in case, any of the matters of fact, in the said oath or affirmation alleged, which shall be within the knowledge of the party, so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture, and apparel, in respect to which, the same shall have been made, or of the value thereof, to be recovered, with costs of suit, of the person by whom such oath or affirmation shall have been made: *Provided always*, That if the master, or person having the charge or command of such ship or vessel, shall be within the district aforesaid, when application shall be made for registering the same, he shall, himself, make oath or affirmation, instead of the said owner, touching his being a citizen, and the means whereby, or man-

ner in which, he is so a citizen; in which case, if what the said master, or person having the said charge or command, shall so swear or affirm, shall not be true, the forfeiture aforesaid shall not be incurred, but he shall, himself, forfeit and pay, by reason thereof, the sum of one thousand dollars.

SEC. 12. *And be it further enacted*, That when any ship or vessel, entitled to be registered, pursuant to this act, shall be purchased by an agent or attorney for, or on account of, a citizen or citizens of the United States, such ship or vessel, being in a district of the United States, more than fifty miles distant, taking the nearest usual route by land, from the one comprehending the port to which, by virtue of such purchase, and by force of this act, such ship or vessel ought to be deemed to belong, it shall be lawful for the collector of the district, where such ship or vessel may be, and he is hereby required, upon the application of such agent or attorney, to proceed to the registering of the said ship or vessel, the said agent or attorney, first complying, on behalf, and in the stead of, the owner or owners thereof, with the requisites prescribed by this act, in order to the registry of ships or vessels, except, that in the oath or affirmation, which shall be taken by the said agent or attorney, instead of swearing or affirming that he is owner, or an owner of such ship or vessel, he shall swear or affirm, that he is agent or attorney for the owner or owners thereof, and that he hath *bona fide* purchased the said ship or vessel, for the person or persons, whom he shall name and describe as the owner or owners thereof: *Provided nevertheless*, That whenever such ship or vessel shall arrive within the district comprehending the port to which such ship or vessel shall belong, the certificate of registry, which shall have been obtained, as aforesaid, shall be delivered up to the collector of such district, who, upon the requisites of this act, in order to the registry of ships or vessels, being complied with, shall grant a new one, in lieu of the first; and the certificate, so delivered up, shall forthwith be returned by the collector, who shall transmit the same to the collector who shall have granted it. And if the said first-mentioned certificate of registry, shall not be delivered up, as above directed, the owner or owners, and the master of such ship or vessel, at the time of her said arrival within the district comprehending the port to which she may belong, shall, severally, forfeit the sum of one hundred dollars, to be recovered, with costs of suit, and the said certificate of registry shall be thenceforth void. And in case any of the matters of fact, in the said oath or affirmation alleged which shall be within the knowledge of the party so swearing or affirming, shall not be true, there shall be a forfeiture of the ship or vessel, together with her tackle, furniture, and apparel, in respect to which, the same shall have been made, or of the value thereof, to be recovered, with



costs of suit, of the person by whom such oath or affirmation shall have been made: *Provided always*, That if the master, or person having the charge or command of such ship or vessel, shall be within the district aforesaid, when application shall be made for registering the same, he shall, himself, make oath or affirmation, instead of the said agent or attorney, touching his being a citizen, and the means whereby, or manner in which, he is so a citizen; in which case, if what the said master, or person having the said charge or command, shall so swear or affirm, shall not be true, the forfeiture aforesaid shall not be incurred, but he shall, himself, forfeit and pay, by reason thereof, the sum of one thousand dollars.

SEC. 13. *And be it further enacted*, That if the certificate of the registry of any ship or vessel shall be lost or destroyed, or mislaid, the master, or other person having the charge or command thereof, may make oath or affirmation, before the collector of the district where such ship or vessel shall first be, after such loss, destruction, or mislaying, who is hereby authorized to administer the same, which oath or affirmation shall be of the form following: "I [inserting here the name of the person swearing or affirming] being master (or having the charge or command) of the ship or vessel, called the [inserting the name of the vessel] do swear (or affirm) that the said ship or vessel, hath been, as I verily believe, registered, according to law, by the name of [inserting again the name of the vessel] and that a certificate thereof was granted by the collector of the district of [naming the district, where registered] which certificate has been lost (or destroyed, or unintentionally and by mere accident mislaid, as the case may be), and (except, where the certificate is alleged to have been destroyed) that the same, if found again, and within my power, shall be delivered up to the collector of the district, in which it was granted"; which oath, or affirmation, shall be subscribed by the party making the same, and upon such oath or affirmation being made, and the other requisites of this act, in order to the registry of ships, or vessels, being complied with, it shall be lawful for the collector of the district, before whom such oath or affirmation is made, to grant a new register, inserting therein, that the same is issued, in the room of the one lost or destroyed. But in all cases, where a register shall be granted, in lieu of the one lost or destroyed, by any other than the collector of the district, to which the ship or vessel actually belongs, such register shall, within ten days after her first arrival within the district to which she belongs, be delivered up to the collector of the said district, who shall, thereupon, grant a new register, in lieu thereof. And in case the master, or commander shall neglect to deliver up such register within the time aforesaid, he shall forfeit one hundred dollars; and the former register shall become null and void.

SEC. 14. *And be it further enacted*, That when any ship or vessel, which shall have been registered, pursuant to this act, or the act hereby, in part, repealed, shall, in whole, or in part, be sold, or transferred to a citizen or citizens of the United States, or shall be altered in form or burden, by being lengthened, or built upon, or from one denomination to another, by the mode or method of rigging or fitting, in every such case, the said ship or vessel shall be registered anew, by her former name, according to the directions hereinbefore contained (otherwise she shall cease to be deemed a ship or vessel of the United States), and her former certificate of registry shall be delivered up to the collector, to whom application for such new registry shall be made, at the time, that the same shall be made to be by him transmitted to the register of the treasury, who shall cause the same to be cancelled. And in every such case of sale or transfer, there shall be some instrument of writing, in the nature of a bill of sale, which shall recite at length the said certificate, otherwise the said ship or vessel shall be incapable of being so registered anew. And in every case in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States. And further, if her said former certificate of registry shall not be delivered up as aforesaid, except where the same may have been destroyed, lost, or unintentionally mislaid, and an oath or affirmation thereof shall have been made, as aforesaid, the owner or owners of such ship or vessel shall forfeit and pay the sum of five hundred dollars, to be recovered with costs of suit.

SEC. 15. *And be it further enacted*, That when the master, or person having the charge or command of a ship or vessel, registered pursuant to this act, or the act hereby in part repealed, shall be changed, the owner, or one of the owners, or the new master of such ship or vessel, shall report such change to the collector of the district where the same shall happen, or where the said ship or vessel shall first be, after the same shall have happened, and shall produce to him the certificate of registry of such ship or vessel, and shall make oath or affirmation, showing that such new master is a citizen of the United States, and the manner in which, or means whereby, he is so a citizen; whereupon the said collector shall indorse upon the said certificate of registry, a memorandum of such change, specifying the name of such new master, and shall subscribe the said memorandum with his name, and if other than the collector of the district, by whom the said certificate of registry shall have been granted, shall transmit a copy of the said memorandum to him, with notice of the particular ship or vessel, to which it shall relate; and the collector of the district, by whom the said certificate shall have been

granted, shall make a like memorandum of such change, in his book of registers, and shall transmit a copy thereof, to the register of the treasury. And if the said change shall not be reported, or if the said oath or affirmation shall not be taken, as above directed, the registry of such ship or vessel shall be void, and the said master, or person, having the charge or command of her shall forfeit and pay the sum of one hundred dollars.

SEC. 16. *And be it further enacted*, That if any ship or vessel heretofore registered, or which shall hereafter be registered, as a ship or vessel of the United States, shall be sold or transferred, in whole or in part by way of trust, confidence, or otherwise, to a subject or citizen of any foreign prince or state, and such sale or transfer shall not be made known, in manner hereinbefore directed, such ship or vessel, together with her tackle, apparel, and furniture shall be forfeited: *Provided*, That if such ship or vessel shall be owned in part only, and it shall be made to appear to the jury, before whom the trial for such forfeiture shall be had, that any other owner of such ship or vessel, being a citizen of the United States, was wholly ignorant of the sale or transfer to, or ownership of, such foreign subject or citizen, the share or interest of such citizen of the United States shall not be subject to such forfeiture; and the residue only shall be so forfeited.

SEC. 17. *And be it further enacted*, That upon the entry of every ship or vessel of the United States, from any foreign port or place, if the same shall be at the port or place, at which the owner, or any of the part-owners reside, such owner or part-owner shall make oath or affirmation, that the register of such ship or vessel contains the name or names of all the persons, who are then owners of the said ship or vessel; or if any part of such ship or vessel has been sold or transferred, since the granting of such register, that such is the case, and that no foreign subject or citizen hath, to the best of his knowledge and belief, any share, by the way of trust, confidence, or otherwise, in such ship or vessel. And if the owner, or any part-owner, shall not reside at the port or place, at which such ship or vessel shall enter, then the master or commander shall make oath or affirmation to the like effect. And if the owner, or part-owner, where there is one, or the master or commander, where there is no owner, shall refuse to swear or affirm as aforesaid, such ship or vessel shall not be entitled to the privileges of a ship or vessel of the United States.

SEC. 18. *And be it further enacted*, That in all cases, where the master, commander, or owner of a ship or vessel, shall deliver up the register of such ship or vessel, agreeable to the provisions of this act, if to the collector of the district, where the same shall have been granted, the said collector shall, thereupon, cancel the bond, which shall have been given at

the time of granting such register ; or, if to the collector of any other district, such collector shall grant to the said master, commander, or owner a receipt or acknowledgment, that such register has been delivered to him, and the time, when ; and upon such receipt being produced to the collector, by whom the register was granted, he shall cancel the bond of the party, as if the register had been returned to him.

SEC. 19. *And be it further enacted*, That the collector of each district shall progressively number the certificates of the registry by him granted, beginning anew, at the commencement of each year, and shall enter an exact copy of each certificate, in a book, to be kept for that purpose ; and shall, once in three months, transmit to the register of the treasury, copies of all the certificates, which shall have been granted by him, including the number of each.

SEC. 20. *And be it further enacted*, That every ship or vessel, built in the United States, after the fifteenth day of August, one thousand seven hundred and eighty-nine, and belonging wholly, or in part, to the subjects of foreign powers, in order to be entitled to the benefits of a ship, built and recorded in the United States, shall be recorded in the office of the collector of the district, in which such ship or vessel was built, in manner following, that is to say : the builder of every such ship or vessel shall make oath or affirmation, before the collector of such district, who is hereby authorized to administer the same, in manner following : " I [inserting here the name of such builder] of [inserting here the place of his residence] shipwright, do swear (or affirm) that [describing here the kind of vessel, and whether ship, brig, snow, schooner, sloop, or whatever else] named [inserting here the name of the ship or vessel] having [inserting here the number of decks] and being, in length [inserting here the number of feet] in breadth [inserting here the number of feet] in depth [inserting here the number of feet] and measuring [inserting here the number of tons] having [specifying whether any or no] gallery, and [also specifying whether any or no] head, was built by me, or under my direction, at [naming the place, county, and State] in the United States, in the year [inserting here the number of the year]" ; which oath or affirmation shall be subscribed by the person making the same, and shall be recorded in a book, to be kept, by the said collector, for that purpose.

SEC. 21. *And be it further enacted*, That the said collector shall cause the said ship or vessel to be surveyed or admeasured,<sup>1</sup> according to the rule prescribed by the forty-third section of the act intituled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares, and merchandise, imported into the United States, and on the tonnage of ships or vessels" ; and the person, by whom such

<sup>1</sup> See act of 1864, c. 83.

admeasurement shall be made, shall grant a certificate thereof, as in the case of a ship or vessel to be registered; which certificate shall be countersigned by the said builder, and by an owner, or the master, or person having the command or charge thereof, or by some other person, being an agent for the owner or owners thereof, in testimony of the truth of the particulars therein contained.

SEC. 22. *And be it further enacted*, That a certificate of the said record, attested under the hand and seal of the said collector, shall be granted to the master of every such ship or vessel, as nearly as may be, of the form following: "In pursuance of an act intituled 'An act concerning the registering and recording of ships or vessels,' I [inserting here the name of the collector of the district] of [inserting here the name of the district] in the United States, do certify, that [inserting here the name of the builder] of [inserting here the place of his residence, county, and State] having sworn, or affirmed, that the [describing the ship or vessel, as in the certificate of record] named [inserting here her name] whereof [inserting here the name of the master] is, at present, master, was built at [inserting here the name of the place, county, and State, where built] by him, or under his direction, in the year [inserting here the number of the year] and [inserting here the name of the surveyor, or other person, by whom the same admeasurement shall have been made] having certified, that the said ship or vessel has [inserting here her number of decks] is, in length [inserting here the number of feet] in breadth [inserting here the number of feet] in depth [inserting here the number of feet] and measures [inserting here the number of tons]; and the said builder and [naming and describing the owner, or master, or agent for the owner or owners, as the case may be, by whom the said certificate shall have been countersigned] having agreed to the said description and admeasurement, the said ship or vessel has been recorded, in the district of [inserting here the name of the district where recorded] in the United States: Witness my hand and seal, this [inserting here the day of the month] day of [inserting here the name of the month] in the year [inserting here the number of the year]"; which certificate shall be recorded in the office of the said collector, and a duplicate thereof transmitted to the register of the treasury of the United States, to be recorded in his office.

SEC. 23. *And be it further enacted*, That if the master, or the name, of any ship or vessel so recorded, shall be changed, the owner, part-owner, or consignee of such ship or vessel, shall cause a memorandum thereof to be indorsed on the certificate of the record, by the collector of the district, where such ship or vessel may be, or at which she shall first arrive, if such change took place in a foreign country; and a copy

thereof shall be entered in the book of records, a transcript whereof shall be transmitted, by the said collector, to the collector of the district, where such certificate was granted (if not the same person), who shall enter the same in his book of records, and forward a duplicate of such entry, to the register of the treasury of the United States; and in such case, until the said owner, part-owner, or consignee, shall cause the said memorandum to be made, by the collector, in manner aforesaid, such ship or vessel shall not be deemed, or considered, as a vessel recorded, in pursuance of this act.

SEC. 24. *And be it further enacted*, That the master, or other person having the command or charge of any ship or vessel, recorded in pursuance of this act, shall, on entry of such ship or vessel, produce the certificate of such record, to the collector of the district, where she shall be so entered; in failure of which, the said ship or vessel shall not be entitled to the privileges of a vessel, recorded as aforesaid: *Provided always, and be it further enacted*, That nothing herein contained shall be construed to make it necessary to record, a second time, any ship or vessel, which shall have been recorded, pursuant to the act, hereby in part repealed; but such recording shall be of the like force and effect, as if made pursuant to this act.

SEC. 25. *And be it further enacted*, That the fees and allowances, for the several services to be performed, pursuant to this act, and the distribution of the same, shall be as follows, to wit:<sup>1</sup> For the admeasurement of every ship or vessel, of one hundred tons, and under, one cent per ton; for the admeasurement of every ship or vessel, above one hundred, and not exceeding two hundred tons, one hundred and fifty cents; for the admeasurement of every ship or vessel, above two hundred tons, two hundred cents; for every certificate of registry or record, two hundred cents; for every indorsement upon a certificate of registry or record, one hundred cents; and for taking every bond required by this act, twenty-five cents. The whole amount of which fees shall be received, and accounted for, by the collector, or, at his option, by the naval officer, where there is one; and where there is a collector, naval officer, and surveyor, shall be equally divided, monthly, between the said officers; and where there is no naval officer, two thirds to the collector, and the other third to the surveyor; and where there is only a collector, he shall receive the whole amount thereof; and where there is more than one surveyor in any district, each of them shall receive his proportionable part of such fees, as shall arise in the port, for which he is appointed: *Provided always*, that in all cases where the tonnage of any ship or vessel shall be ascertained, by any person appointed for that purpose, such per-

<sup>1</sup> See act of 1864, c. 83.

son shall be paid a reasonable compensation therefor, out of the fees aforesaid, before any distribution thereof, as aforesaid. And every collector, and naval officer, and every surveyor, who shall reside at a port where there is no collector, shall cause to be affixed, and constantly kept, in some conspicuous part of his office, a fair table of the rates of fees, demandable by this act.

SEC. 26. *And be it further enacted*, That every collector, or officer, who shall knowingly make, or be concerned in making, any false register or record, or shall knowingly grant, or be concerned in granting, any false certificate of registry or record of, or for any ship or vessel, or other false document whatsoever, touching the same, contrary to the true intent and meaning of this act, or who shall designedly take any other, or greater fees, than are by this act allowed, or who shall receive any voluntary reward or gratuity, for any of the services performed, pursuant thereto; and every surveyor, or other person appointed to measure any ship or vessel, who shall wilfully deliver to any collector, or naval officer, a false description of such ship or vessel, to be registered or recorded, shall, upon conviction of any such neglect, or offence, forfeit the sum of one thousand dollars, and be rendered incapable of serving in any office of trust or profit, under the United States; and if any person or persons, authorized and required by this act, in respect to his or their office or offices, to perform any act or thing, required to be done or performed, pursuant to any of the provisions of this act, shall wilfully neglect to do or perform the same, according to the true intent and meaning of this act, such person or persons shall, on being duly convicted thereof, if not subject to the penalty and disqualification aforesaid, forfeit the sum of five hundred dollars for the first offence, and a like sum for the second offence, and shall, thenceforth, be rendered incapable of holding any office of trust or profit under the United States.

SEC. 27. *And be it further enacted*, That if any certificate of registry, or record, shall be fraudulently or knowingly used for any ship or vessel, not then actually entitled to the benefit thereof, according to the true intent of this act, such ship or vessel shall be forfeited to the United States, with her tackle, apparel, and furniture.

SEC. 28. *And be it further enacted*, That if any person or persons shall falsely make oath or affirmation to any of the matters herein required to be verified, such person or persons shall suffer the like pains and penalties, as shall be incurred by persons committing wilful and corrupt perjury; and that if any person or persons shall forge, counterfeit, erase, alter, or falsify any certificate, register, record, or other document, mentioned, described, or authorized, in and by this act, such person, or persons, shall, for every such offence, forfeit the sum of five hundred dollars.

SEC. 29. *And be it further enacted*, That all the penalties and forfeitures, which may be incurred, for offences against this act, shall and may be sued for, prosecuted, and recovered, in such courts, and be disposed of in such manner as any penalties and forfeitures which may be incurred for offences against the act, intituled "An act to provide more effectually for the collection of the duties imposed by law on goods, wares, and merchandise, imported into the United States, and on the tonnage of ships or vessels," may be legally sued for, prosecuted, recovered, and disposed of: *Provided always*, That if any officer entitled to a part or share of any such penalty or forfeiture, shall be necessary as a witness, on the trial for such penalty or forfeiture, such officer may be a witness upon the said trial; but in such a case, he shall not receive, nor be entitled to any part or share of the said penalty or forfeiture; and the part or share to which he would otherwise have been entitled, shall accrue to the United States.

SEC. 30. *And be it further enacted*, That from and after the last day of March next, this act shall be in full force and effect; and so much of the act, intituled "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," as comes within the purview of this act, shall, after the said last day of March, be repealed.

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ACT OF 1793, CHAPTER 8 (1 U. S. Stats. at Large, 305).

*An Act for enrolling and licensing Ships or Vessels to be employed in the Coasting Trade and Fisheries, and for regulating the same.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That ships or vessels, enrolled by virtue of "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," and those of twenty tons and upwards, which shall be enrolled after the last day of May next, in pursuance of this act, and having a license in force, or if less than twenty tons, not being enrolled, shall have a license in force, as is hereinafter required, and no others, shall be deemed ships or vessels of the United States, entitled to the privileges of ships or vessels employed in the coasting trade or fisheries.

SEC. 2. *And be it further enacted*, That from and after the last day of May next, in order for the enrolment of any ship or vessel, she shall possess the same qualifications, and the same requisites, in all respects, shall be complied with, as are made necessary for registering ships or vessels, by the act, intituled "An act concerning the registering and recording of ships or vessels," and the same duties and authorities are



hereby given and imposed on all officers, respectively, in relation to such enrolments, and the same proceedings shall be had, in similar cases, touching such enrolments; and the ships or vessels so enrolled, with the master, or owner, or owners thereof, shall be subject to the same requisites, as are in those respects provided for vessels registered by virtue of the aforesaid act; the record of which enrolment shall be made, and an abstract or copy thereof granted, as nearly as may be, in the form following: "Enrolment in conformity to an act of the Congress of the United States of America, intituled 'An act for enrolling and licensing ships or vessels, to be employed in the coasting trade and fisheries, and for regulating the same,' [inserting here the name of the person, with his occupation and place of abode, by whom the oath or affirmation is to be made] having taken and subscribed the oath (or affirmation) required by this act, and having sworn (or affirmed) that he (or she, and if more than one owner, adding the words 'together with,' and the name or names, occupation or occupations, place or places of abode, of the owner or owners) is (or are) a citizen (or citizens) of the United States, and sole owner (or owners) of the ship or vessel, called the [inserting here her name] of [inserting here the name of the port to which she may belong] whereof [inserting here the name of the master] is at present master, and is a citizen of the United States, and that the said ship or vessel was [inserting here when and where built] and [inserting here the name and office, if any, of the person by whom she shall have been surveyed, or admeasured] having certified, that the said ship or vessel has [inserting here the number of decks] and [inserting here the number of masts] and that her length is [inserting here the number of feet] her breadth [inserting here the number of feet] her depth [inserting here the number of feet] and that she measures [inserting here her number of tons] that she is [describing here the particular kind of vessel, whether ship, brigantine, snow, schooner, sloop, or whatever else, together with her built, and specifying, whether she has any or no gallery or head] and the said [naming the owner, or the master, or other person acting in behalf of the owner or owners, by whom the certificate of admeasurement shall have been countersigned] having agreed to the description and admeasurement above specified, and sufficient security having been given, according to the said act, the said ship or vessel has been duly enrolled, at the port of [naming the port where enrolled]. Given under my hand and seal, at [naming the said port] this [inserting the particular day] of [naming the month] in the year [specifying the number of the year, in words at length]."

SEC. 3. *And be it further enacted,* That it shall and may be lawful for the collectors of the several districts, to enroll and license any ship or vessel, that may be registered, upon such registry being given up, or to

register any ship or vessel, that may be enrolled, upon such enrolment and license being given up. And when any ship or vessel shall be in any other district than the one to which she belongs, the collector of such district, on the application of the master or commander thereof, and upon his taking an oath or affirmation, that according to his best knowledge and belief, the property remains, as expressed in the register or enrolment proposed to be given up, and upon his giving the bonds required for granting registers, shall make the exchanges aforesaid; but in every such case, the collector, to whom the register, or enrolment and license may be given up, shall transmit the same to the register of the treasury; and the register, or enrolment and license, granted in lieu thereof, shall, within ten days after the arrival of such ship or vessel within the district, to which she belongs, be delivered to the collector of the said district, and be by him cancelled. And if the said master or commander shall neglect to deliver the said register or enrolment and license, within the time aforesaid, he shall forfeit one hundred dollars.

SEC. 4. *And be it further enacted*, That in order to the licensing of any ship or vessel, for carrying on the coasting trade or fisheries, the husband, or managing owner, together with the master thereof, with one or more sureties to the satisfaction of the collector granting the same, shall become bound to pay to the United States, if such ship or vessel be of the burden of five tons, and less than twenty tons, the sum of one hundred dollars; and if twenty tons, and not exceeding thirty tons, the sum of two hundred dollars; and if above thirty tons, and not exceeding sixty tons, the sum of five hundred dollars; and if above sixty tons, the sum of one thousand dollars, in case it shall appear, within two years from the date of the bond, that such ship or vessel has been employed in any trade, whereby the revenue of the United States has been defrauded during the time the license granted to such ship or vessel remained in force; and the master of such ship or vessel shall also swear, or affirm, that he is a citizen of the United States, and that such license shall not be used for any other vessel, or any other employment, than that for which it is specially granted, or in any trade or business, whereby the revenue of the United States may be defrauded; and if such ship or vessel be less than twenty tons burden, the husband or managing owner shall swear or affirm, that she is wholly the property of a citizen or citizens of the United States; whereupon it shall be the duty of the collector of the district comprehending the port, whereto such ship or vessel may belong (the duty of six cents per ton being first paid), to grant a license, in the form following: "License for carrying on the [here insert coasting trade, whale fishery, or cod fishery, as the case may be].

"In pursuance of an act of the Congress of the United States of America,

intituled 'An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same,' [inserting here the name of the husband or managing owner, with his occupation and place of abode, and the name of the master, with the place of his abode] having given bond, that the [insert here the description of the vessel, whether ship, brigantine, snow, schooner, sloop, or whatever else she may be] called the [insert here the vessel's name] whereof the said [naming the master] is master, burden [insert here the number of tons, in words] tons, as appears by her enrolment, dated at [naming the district, day, month, and year, in words at length (but if she be less than twenty tons, insert, instead thereof), proof being had of her admeasurement] shall not be employed in any trade, while this license shall continue in force, whereby the revenue of the United States shall be defrauded, and having also sworn (or affirmed) that this license shall not be used for any other vessel, or for any other employment, than is herein specified, license is hereby granted for the said [inserting here the description of the vessel] called the [inserting here the vessel's name] to be employed in carrying on the [inserting here coasting trade, whale fishery, or cod fishery, as the case may be] for one year from the date hereof, and no longer. Given under my hand and seal, at [naming the said district] this [inserting the particular day] day of [naming the month] in the year [specifying the number of the year in words at length]."

SEC. 5. *And be it further enacted*, That no license, granted to any ship or vessel, shall be considered in force, any longer than such ship or vessel is owned, and of the description set forth in such license, or for carrying on any other business or employment, than that for which she is specially licensed, and if any ship or vessel be found with a forged or altered license, or making use of a license granted for any other ship or vessel, such ship or vessel, with her tackle, apparel, and the cargo found on board her, shall be forfeited.

SEC. 6. *And be it further enacted*, That after the last day of May next, every ship or vessel of twenty tons or upwards (other than such as are registered) found trading between district and district, or between different places in the same district, or carrying on the fishery, without being enrolled and licensed, or if less than twenty tons, and not less than five tons, without a license, in manner as is provided by this act, such ship or vessel, if laden with goods the growth or manufacture of the United States only (distilled spirits excepted) or in ballast, shall pay the same fees and tonnage in every port of the United States, at which she may arrive, as ships or vessels not belonging to a citizen or citizens of the United States, and if she have on board any articles of foreign growth or manufacture, or distilled spirits, other than sea stores, the ship or vessel,

together with her tackle, apparel, and furniture, and the lading found on board, shall be forfeited: *Provided*, however, if such ship or vessel be at sea, at the expiration of the time for which the license was given, and the master of such ship or vessel shall swear or affirm that such was the case, and shall also within forty-eight hours after his arrival deliver to the collector of the district in which he shall first arrive the license which shall have expired, the forfeiture aforesaid shall not be incurred, nor shall the ship or vessel be liable to pay the fees and tonnage aforesaid.

SEC. 7. *And be it further enacted*, That the collector of each district shall progressively number the licenses by him granted, beginning anew at the commencement of each year, and shall make a record thereof in a book, to be by him kept for that purpose, and shall, once in three months, transmit to the register of the treasury copies of the licenses, which shall have been so granted by him; and also of such licenses as shall have been given up or returned to him, respectively, in pursuance of this act. And where any ship or vessel shall be licensed, or enrolled anew, or being licensed or enrolled, shall afterwards be registered, or being registered, shall afterwards be enrolled, or licensed, she shall, in every such case, be enrolled, licensed, or registered by her former name.

SEC. 8. *And be it further enacted*, That if any ship or vessel, enrolled or licensed, as aforesaid, shall proceed on a foreign voyage, without first giving up her enrolment and license to the collector of the district comprehending the port, from which she is about to proceed on such foreign voyage, and being duly registered by such collector, every such ship or vessel, together with her tackle, apparel, and furniture, and the goods, wares, and merchandise, so imported therein, shall be liable to seizure and forfeiture: *Provided always*, if the port, from which such ship or vessel is about to proceed on such foreign voyage be not within the district where such ship or vessel is enrolled, the collector of such district shall give to the master of such ship or vessel a certificate, specifying that the enrolment and license of such ship or vessel is received by him, and the time when it was so received; which certificate shall afterwards be delivered by the said master to the collector, who may have granted such enrolment and license.

SEC. 9. *And be it further enacted*, That the license, granted to any ship or vessel, shall be given up to the collector of the district, who may have granted the same, within three days after the expiration of the time for which it was granted, in case such ship or vessel be then within the district, or if she be absent, at that time, within three days from her first arrival within the district afterwards, or if she be sold out of the district, within three days after the arrival of the master within any district, to

the collector of such district, taking his certificate therefor; and if the master thereof shall neglect, or refuse to deliver up the license, as aforesaid, he shall forfeit fifty dollars; but if such license shall have been previously given up to the collector of any other district, as authorized by this act, and a certificate thereof, under the hand of such collector, be produced by such master, or if such license be lost, or destroyed, or unintentionally mislaid, so that it cannot be found, and the master of such ship or vessel shall make and subscribe an oath, or affirmation, that such license is lost, destroyed, or unintentionally mislaid, as he verily believes, and that the same, if found, shall be delivered up, as is herein required, then the aforesaid penalty shall not be incurred. And if such license shall be lost, destroyed, or unintentionally mislaid, as aforesaid, before the expiration of the time for which it was granted, upon the like oath or affirmation being made and subscribed by the master of such ship or vessel, the said collector is hereby authorized and required, upon application being made therefor, to license such ship or vessel anew.

SEC. 10. *And be it further enacted*, That it shall and may be lawful, for the owner or owners of any licensed ship or vessel, to return such license to the collector who granted the same at any time within the year for which it was granted, who shall thereupon, cancel the same, and shall license such vessel anew, upon the application of the owner or owners, and upon the conditions hereinbefore required being complied with; and in case the term, for which the former license was granted shall not be expired, an abatement of the tonnage of six cents per ton shall be made, in the proportion of the time so unexpired.

SEC. 11. *And be it further enacted*, That every licensed ship or vessel shall have her name, and the port to which she belongs, painted on her stern, in the manner as is provided for registered ships or vessels, and if any licensed ship or vessel be found, without such painting, the owner or owners thereof shall pay twenty dollars.<sup>1</sup>

SEC. 12. *And be it further enacted*, That when the master of any licensed ship or vessel, ferry-boats excepted, shall be changed, the new master, or, in case of his absence, the owner, or one of the owners thereof, shall report such change to the collector residing at the port where the same may happen, if there be one, otherwise, to the collector residing at any port, where such ship or vessel may next arrive, who, upon the oath or affirmation of such new master, or, in case of his absence, of the owner or one of the owners, that he is a citizen of the United States, and that such ship or vessel shall not, while such license continues in force, be employed in any manner, whereby the revenue of the United States may be defrauded, shall indorse such change on the license, with the name of the

<sup>1</sup> See act of 1864, c. 78.

new master ; and when any change shall happen, as aforesaid, and such change shall not be reported, and the indorsement made of such change, as is herein required, such ship or vessel, found carrying on the coasting trade or fisheries, shall be subject to pay the same fees and tonnage, as a vessel of the United States, having a register, and the said new master shall forfeit and pay the sum of ten dollars.

SEC. 13. *And be it further enacted*, That it shall be lawful, at all times, for any officer concerned in the collection of the revenue, to inspect the enrolment or license of any ship or vessel ; and if the master of any such ship or vessel shall not exhibit the same, when thereunto required by such officer, he shall pay one hundred dollars.

SEC. 14. *And be it further enacted*, That the master or commander of every ship or vessel licensed for carrying on the coasting trade, destined from a district in one State to a district in the same, or an adjoining State on the sea-coast, or on a navigable river, having on board, either distilled spirits in casks exceeding five hundred gallons, wine in casks exceeding two hundred and fifty gallons, or in bottles exceeding one hundred dozens, sugar in casks or boxes exceeding three thousand pounds, tea in chests or boxes exceeding five hundred pounds, coffee in casks or bags exceeding one thousand pounds, or foreign merchandise in packages, as imported, exceeding in value four hundred dollars, or goods, wares, or merchandise, consisting of such enumerated or other articles of foreign growth or manufacture, or of both, whose aggregate value exceeds eight hundred dollars, shall, previous to the departure of such ship or vessel from the port where she may then be, make out and subscribe duplicate manifests of the whole of such cargo on board such ship or vessel, specifying in such manifests, the marks and numbers of every cask, bag, box, chest, or package containing the same, with the name and place of residence of every shipper and consignee and the quantity shipped by and to each, and if there be a collector or surveyor, residing at such port, or within five miles thereof, he shall deliver such manifests to the collector, if there be one, otherwise to the surveyor, before whom he shall swear or affirm, to the best of his knowledge and belief, that the goods therein contained were legally imported, and the duties thereupon paid or secured, or if spirits distilled within the United States, that the duties thereupon have been paid or secured, whereupon the said collector or surveyor shall certify the same on the said manifests, one of which he shall return to the said master, with a permit, specifying thereon, generally, the lading on board such ship or vessel, and authorizing him to proceed to the port of his destination. And if any ship or vessel, being laden and destined, as aforesaid, shall depart from the port where she may then be, without the master or commander having first made out

and subscribed duplicate manifests of the lading on board such ship or vessel, and in case there be a collector or surveyor residing at such port, or within five miles thereof, without having previously delivered the same to the said collector or surveyor, and obtaining a permit, in manner as is herein required, such master or commander shall pay one hundred dollars.

SEC. 15. *And be it further enacted,* That the master or commander of every ship or vessel licensed for carrying on the coasting-trade, having on board either distilled spirits in casks exceeding five hundred gallons, wine in casks exceeding two hundred and fifty gallons, or in bottles exceeding one hundred dozens, sugar in casks or boxes exceeding three thousand pounds, tea in chests or boxes exceeding five hundred pounds, coffee in casks or bags exceeding one thousand pounds, or foreign merchandise in packages, as imported, exceeding in value four hundred dollars, or goods, wares, or merchandise, consisting of such enumerated or other articles of foreign growth or manufacture, or of both, whose aggregate value exceeds eight hundred dollars, and arriving from a district in one State, at a district in the same or an adjoining State on the sea-coast, or on a navigable river, shall, previous to the unlading of any part of the cargo of such ship or vessel, deliver to the collector, if there be one, or if not, to the surveyor residing at the port of her arrival, or if there be no collector or surveyor residing at such port, then to a collector or surveyor, if there be any such officer, residing within five miles thereof, the manifest of the cargo, certified by the collector or surveyor of the district from whence she sailed (if there be such manifest), otherwise the duplicate manifests thereof, as is hereinbefore directed, to the truth of which, before such officer, he shall swear or affirm. And if there have been taken on board such ship or vessel any other or more goods than are contained in such manifest or manifests, since her departure from the port from whence she first sailed, or if any goods have been since landed, the said master or commander shall make known and particularize the same to the said collector or surveyor, or if no such goods have been so taken on board or landed, he shall so declare, to the truth of which he shall swear or affirm: Whereupon, the said collector or surveyor shall grant a permit for unlading a part, or the whole of such cargo, as the said master or commander may request. And if there be no collector or surveyor residing at or within five miles of the said port of her arrival, the master or commander of such ship or vessel may proceed to discharge the lading from on board such ship or vessel, but shall deliver to the collector or surveyor residing at the first port where he may next afterwards arrive, and within twenty-four hours of his arrival, the manifest or manifests aforesaid, noting thereon the times when, and places where, the goods therein mentioned have been unladen, to the truth

of which, before the said last-mentioned collector or surveyor, he shall swear or affirm; and if the master or commander of any such ship or vessel, being laden as aforesaid, shall neglect or refuse to deliver the manifest or manifests, at the times, and in the manner, herein directed, he shall pay one hundred dollars.

SEC. 16. *And be it further enacted*, That the master or commander of every ship or vessel, licensed for carrying on the coasting-trade, and being destined from any district of the United States to a district other than a district in the same, or an adjoining State, on the sea-coast, or on a navigable river, shall, previous to her departure, deliver to the collector residing at the port where such ship or vessel may be, if there is one, otherwise to the collector of the district comprehending such port, or to a surveyor within the district, as the one or the other may reside nearest to the port at which such ship or vessel may be, duplicate manifests of the whole cargo on board such ship or vessel, or if there be no cargo on board, he shall so certify, and if there be any distilled spirits, or goods, wares, and merchandise, of foreign growth or manufacture on board, other than what may, by the collector, be deemed sufficient for sea stores, he shall specify in such manifests the marks and numbers of every cask, bag, box, chest, or package, containing the same, with the name and place of residence of every shipper and consignee of such distilled spirits, or goods of foreign growth or manufacture, and the quantity shipped by, and to each, to be by him subscribed, and to the truth of which he shall swear or affirm; and shall also swear or affirm, before the said collector or surveyor, that such goods, wares, or merchandise, of foreign growth or manufacture, were, to the best of his knowledge and belief, legally imported, and the duties thereupon paid or secured; or if spirits distilled within the United States, that the duties thereupon have been duly paid or secured; upon the performance of which, and not before, the said collector or surveyor shall certify the same on the said manifests; one of which he shall return to the master, with a permit, thereto annexed, authorizing him to proceed to the port of his destination. And if any such ship or vessel shall depart from the port where she may then be, having distilled spirits, or goods, wares, or merchandise, of foreign growth or manufacture, on board, without the several things herein required being complied with, the master thereof shall forfeit one hundred dollars; or if the lading be of goods, the growth or manufacture of the United States only, or if such ship or vessel have no cargo, and she depart, without the several things herein required being complied with, the said master shall forfeit and pay fifty dollars.

SEC. 17. *And be it further enacted*, That the master or commander of every ship or vessel, licensed to carry on the coasting trade, arriving at any district of the United States, from any district, other than a district in the



same, or an adjoining State on the sea-coast, or on a navigable river, shall deliver to the collector residing at the port where she may arrive, if there be one, otherwise to the collector or surveyor in the district comprehending such port, as the one, or the other, may reside nearest thereto, if the collector or surveyor reside at a distance not exceeding five miles, within twenty-four hours, or if at a greater distance, within forty-eight hours next after his arrival; and previous to the unlading any of the goods brought in such ship or vessel, the manifest of the cargo (if there be any) certified by the collector or surveyor of the district from whence she last sailed, and shall make oath or affirmation, before the said collector or surveyor, that there was not when he sailed from the district where his manifest was certified, or has been since, or then is, any more or other goods, wares, or merchandise of foreign growth or manufacture, or distilled spirits (if there be any other than sea stores on board such vessel) than is therein mentioned; and if there be no such goods, he shall so swear or affirm; and if there be no cargo on board, he shall produce the certificate of the collector or surveyor of the district from whence she last sailed, as aforesaid, that such is the case: Whereupon such collector or surveyor shall grant a permit for unlading the whole, or part of such cargo (if there be any) within his district, as the master may request; and where a part only of the goods, wares, and merchandise, of foreign growth or manufacture, or of distilled spirits, brought in such ship or vessel, is intended to be landed, the said collector or surveyor shall make an indorsement of such part on the back of the manifest, specifying the articles to be landed; and shall return such manifest to the master, indorsing also thereon his permission for such ship or vessel to proceed to the place of her destination; and if the master of such ship or vessel shall neglect or refuse to deliver the manifest (or if she has no cargo, the certificate), within the time herein directed, he shall forfeit one hundred dollars, and the goods, wares, and merchandise, of foreign growth or manufacture, or distilled spirits, found on board, or landed from such ship or vessel, not being certified, as is herein required, shall be forfeited, and if the same shall amount to the value of eight hundred dollars, such ship or vessel, with her tackle, apparel, and furniture, shall be also forfeited.

SEC. 18. *And be it further enacted*, That nothing in this act contained shall be so construed as to oblige the master or commander of any ship or vessel, licensed for carrying on the coasting-trade, bound from a district in one State to a district in the same, or an adjoining State on the sea-coast, or on a navigable river, having on board goods, wares, or merchandise, of the growth, product, or manufactures of the United States only (except distilled spirits) or distilled spirits, not more than five hundred gallons, wine in casks not more than two hundred and fifty gallons, or in bottles not

more than one hundred dozens, sugar in casks or boxes not more than three thousand pounds, tea in chests or boxes not more than five hundred pounds, coffee in casks or bags not more than one thousand pounds, or foreign merchandise in packages, as imported, of not more value than four hundred dollars, or goods, wares, or merchandise, consisting of such enumerated or other articles of foreign growth or manufacture, or of both, whose aggregate value shall be not more than eight hundred dollars, to deliver a manifest thereof, or obtain a permit, previous to her departure, or on her arrival within such district, to make any report thereof; but such master shall be provided with a manifest, by him subscribed, of the lading, of what kind soever, which was on board such ship or vessel, at the time of his departure from the district from which she last sailed, and if the same, or any part of such lading, consists of distilled spirits, or goods, wares, or merchandise, of foreign growth or manufacture, with the marks and numbers of each cask, bag, box, chest, or package, containing the same, with the name of the shipper and consignee of each; which manifest shall be by him exhibited, for the inspection of any officer of the revenue, when, by such officer, thereunto required; and shall also inform such officer from whence such ship or vessel last sailed, and how long she has been in port, when by him so interrogated. And if the master of such ship or vessel shall not be provided, on his arrival within any such district, with a manifest, and exhibit the same, as is herein required, if the lading of such ship or vessel consist wholly of goods, the produce or manufacture of the United States (distilled spirits excepted) he shall forfeit twenty dollars, or if there be distilled spirits, or goods, wares, or merchandise, of foreign growth or manufacture, on board, excepting what may be sufficient for sea stores, he shall forfeit forty dollars; or if he shall refuse to answer the interrogatories truly, as is herein required, he shall forfeit the sum of one hundred dollars. And if any of the goods laden on board such ship or vessel shall be of foreign growth or manufacture, or of spirits distilled within the United States, so much of the same as may be found on board such ship or vessel, and which shall not be included in the manifest exhibited by such master, shall be forfeited.

SEC. 19. *And be it further enacted,* That it shall and may be lawful for the collector of the district of Pennsylvania, to grant permits for the transportation of goods, wares, or merchandise, of foreign growth or manufacture, across the State of New Jersey, to the district of New York, or across the State of Delaware, to any district in the State of Maryland or Virginia; and for the collector of the district of New York, to grant like permits for the transportation across the State of New Jersey; and for the collector of any district of Maryland or Virginia, to grant like permits for the transportation across the State of Delaware, to the district

of Pennsylvania: *Provided*, That every such person shall express the name of the owner, or person sending such goods, and of the person or persons, to whom such goods shall be consigned, with the marks, numbers, and description of the packages, whether bale, box, chest, or otherwise, and the kind of goods contained therein, and the date, when granted; and the owner, or person sending such goods, shall swear or affirm that they were legally imported, and the duties thereupon paid or secured: *And provided also*, That the owner or consignee of all such goods, wares, and merchandise, shall, within twenty-four hours after the arrival thereof, at the place to which they were permitted to be transported, report the same, to the collector of the district where they shall so arrive, and shall deliver up the permit accompanying the same, and if the owner or consignee aforesaid shall neglect or refuse to make due entry of such goods, within the time, and in the manner, herein directed, all such goods, wares, and merchandise, shall be subject to forfeiture; and if the permit granted shall not be given up, within the time limited for making the said report, the person or persons to whom it was granted, neglecting or refusing to deliver it up, shall forfeit fifty dollars for every twenty-four hours it shall be withheld afterwards: *Provided*, That where the goods, wares, and merchandise, to be transported in manner aforesaid, shall be of less value than eight hundred dollars, the said oath and permit shall not be deemed necessary, nor shall the owner or consignee be obliged to make report to the collector of the district where the said goods, wares, and merchandise shall arrive.

SEC. 20. *And be it further enacted*, That when any ship or vessel of the United States, registered according to law, shall be employed in going from any one district in the United States, to any other district, such ship or vessel, and the master or commander thereof, with the goods she may have on board, previous to her departure from the district, where she may be, and also, upon her arrival in any other district, shall be subject (except as to the payment of fees) to the same regulations, provisions, penalties, and forfeitures, and the like duties are imposed on like officers, as is provided by the sixteenth and seventeenth sections of this act, for ships or vessels licensed for carrying on the coasting trade: *Provided however*, that nothing herein contained, shall be construed to extend to registered ships or vessels of the United States having on board goods, wares, and merchandise of foreign growth or manufacture, brought into the United States in such ship or vessel from a foreign port, and on which the duties have not been paid or secured, according to law.

SEC. 21. *And be it further enacted*, That when any ship or vessel, licensed for carrying on the fishery, shall be intended to touch and trade at any foreign port or place, it shall be the duty of the master, com-

mander, or owner, to obtain permission for that purpose, from the collector of the district where such ship or vessel may be, previous to her departure, and the master or commander of every such ship or vessel, shall deliver like manifests, and make like entries, both of the ship or vessel, and of the goods, wares, or merchandise on board, within the same time, and under the same penalty, as by the laws of the United States, are provided for ships or vessels of the United States arriving from a foreign port. And if any ship or vessel, licensed for carrying on the fisheries, shall be found within three leagues of the coast, with goods, wares, or merchandise of foreign growth or manufacture, exceeding the value of five hundred dollars, without having such permission as is herein directed, such ship or vessel, together with her goods, wares, or merchandise of foreign growth or manufacture imported therein, shall be subject to seizure and forfeiture.

SEC. 22. *And be it further enacted*, That the master or commander of every ship or vessel, employed in the transportation of goods from district to district, that shall put into a port, other than the one to which she was bound, shall, within twenty-four hours of his arrival, if there be an officer residing at such port, and she continue there so long, make report of his arrival, to such officer, with the name of the place he came from, and to which he is bound, with an account of his lading; and if the master of such ship or vessel shall neglect or refuse to do the same, he shall forfeit twenty dollars.

SEC. 23. *And be it further enacted*, That if the master or commander of any ship or vessel, employed in the transportation of goods, from district to district, having on board goods, wares, or merchandise, of foreign growth or manufacture, or distilled spirits, shall, on his arrival at the port to which he was destined, have lost or mislaid the certified manifest of the same, or the permit which was given therefor, by the collector or surveyor of the district from whence he sailed, the collector of the district where he shall so arrive, shall take bond for the payment of the duties on such goods, wares, and merchandise of foreign growth or manufacture, or distilled spirits, within six months, in the same manner, as though they were imported from a foreign country: *Provided however*, such bond shall be cancelled, if the said master shall deliver, or cause to be delivered to the collector taking such bond, and within the term therein limited for payment, a certificate from the collector or surveyor of the district from whence he sailed, that such goods were legally exported in such ship or vessel, from such district.

SEC. 24. *And be it further enacted*, That the master or commander of every foreign ship or vessel, bound from a district in the United States, to any other district within the same, shall, in all cases, previous to her

departure from such district, deliver to the collector of such district, duplicate manifests of the lading on board such ship or vessel, if there be any, or if there be none, he shall declare that such is the case, and to the truth of such manifests or declaration, he shall swear or affirm, and also obtain a permit, from the said collector, authorizing him to proceed to the place of his destination. And the master or commander of every such ship or vessel, on his arrival within any district, from any other district, shall, in all cases, within forty-eight hours after his arrival, and previous to the unloading any goods from on board such ship or vessel, deliver to the collector of the district where he may have arrived, a manifest of the goods laden on board such ship or vessel, if any there be, or if in ballast only, he shall so declare, and to the truth of which manifest or declaration, he shall swear or affirm; and also, that such manifest contains an account of all the goods, wares, and merchandise which were on board such ship or vessel, at the time, or have been, since her departure from the place from whence she shall be reported last to have sailed; and he shall also deliver to such collector the permit which was given him from the collector of the district from whence he sailed.<sup>1</sup> And if the master or commander of any such ship or vessel shall neglect or refuse complying with any of the requirements herein made, he shall forfeit one hundred dollars: *Provided always*, That nothing herein contained shall be construed as affecting the payment of tonnage, or any other requirements which such ships or vessels are now subject to by the present existing laws of the United States.

SEC. 25. *And be it further enacted*, That in every case, where the collector is, by this act, directed to grant any enrolment, license, certificate, permit, or other document, the naval officer residing at the port (if there be one) shall sign the same, and every surveyor who shall certify a manifest, or grant a permit, or who shall receive any certified manifest, or a permit as is provided for in this act, shall make monthly returns thereof, or sooner, if it can conveniently be made, to the collector of the district where such surveyor may reside.

SEC. 26. *And be it further enacted*, That before any ship or vessel, of the burden of five tons, and less than twenty tons, shall be licensed, the same admeasurement shall be made of such ship or vessel, and the same provisions observed relative thereto, as are to be observed in case of admeasuring ships or vessels to be registered or enrolled;<sup>2</sup> but in all cases, where such ship or vessel, or any other licensed ship or vessel, shall have been once admeasured, it shall not be necessary to measure such ship or vessel anew, for the purpose of obtaining another enrol-

<sup>1</sup> See act of 1817, c. 81, § 4.

<sup>2</sup> See act of 1864, c. 83.

ment or license, except such ship or vessel shall have undergone some alteration as to her burden, subsequent to the time of her former license.

SEC. 27. *And be it further enacted*, That it shall be lawful for any officer of the revenue, to go on board of any ship or vessel, whether she shall be within or without his district, and the same to inspect, search, and examine, and if it shall appear, that any breach of the laws of the United States has been committed, whereby such ship or vessel, or the goods, wares, and merchandise on board, or any part thereof, is, or are liable to forfeiture, to make seizure of the same.

SEC. 28. *And be it further enacted*, That in every case where a forfeiture of any ship or vessel, or of any goods, wares, or merchandise, shall accrue, it shall be the duty of the collector, or other proper officer, who shall give notice of the seizure of such ship or vessel, or of such goods, wares, or merchandise, to insert in the same advertisement, the name or names, and the place or places of residence, of the person or persons, to whom any such ship or vessel, goods, wares, and merchandise belonged, or were consigned, at the time of such seizure, if the same shall be known to him.

SEC. 29. *And be it further enacted*, That every collector, who shall knowingly make any record of enrolment or license of any ship or vessel, and every other officer, or person, appointed by, or under them, who shall make any record, or grant any certificate, or other document whatever, contrary to the true intent and meaning of this act, or shall take any other, or greater fees, than are by this act allowed, or shall receive, for any service performed pursuant to this act, any reward or gratuity, and every surveyor, or other person appointed to measure ships or vessels, who shall wilfully deliver to any collector, or naval officer, a false description of any ship or vessel, to be enrolled or licensed, in pursuance of this act, shall, upon conviction of any such neglect or offence, forfeit to the United States five hundred dollars, and be rendered incapable of serving in any office of trust or profit, under the United States. And if any person, authorized and required by this act, in respect to his office, to perform any act or thing required by this act, shall wilfully neglect or refuse to do and perform the same, according to the true intent and meaning of this act, such person, on being duly convicted thereof, if not hereby subject to the penalty and disqualifications aforesaid, shall forfeit and pay the sum of five hundred dollars for the first offence, and a like sum for the second offence, and shall from thenceforward, be rendered incapable of holding any office of trust or profit under the United States.

SEC. 30. *And be it further enacted*, That if any person or persons shall swear, or affirm to any of the matters, herein required to be verified,

knowing the same to be false, such person or persons shall suffer the like pains and penalties, as shall be incurred, by persons committing wilful and corrupt perjury. And if any person or persons shall forge, counterfeit, erase, alter, or falsify any enrolment, license, certificate, permit, or other document, mentioned or required in this act, to be granted by any officer of the revenue, such person or persons, so offending, shall forfeit five hundred dollars.

SEC. 31. *And be it further enacted*, That if any person or persons shall assault, resist, obstruct, or hinder any officer in the execution of this act, or of any other act or law of the United States, herein mentioned, or of any of the powers or authorities vested in him by this act, or any other act or law, as aforesaid, all and every person and persons so offending, shall, for every such offence, for which no other penalty is particularly provided, forfeit five hundred dollars.

SEC. 32. *And be it further enacted*, That if any licensed ship or vessel shall be transferred, in whole or in part, to any person, who is not, at the time of such transfer, a citizen of, and resident within, the United States, or if any such ship or vessel shall be employed in any other trade than that for which she is licensed, or shall be found with a forged or altered license, or one granted for any other ship or vessel, every such ship or vessel, with her tackle, apparel, and furniture, and the cargo found on board her, shall be forfeited.

SEC. 33. *Provided nevertheless, and be it further enacted*, That in all cases where the whole or any part of the lading, or cargo, on board any ship or vessel, shall belong *bonâ fide* to any person or persons other than the master, owner, or mariners of such ship or vessel, and upon which the duties shall have been previously paid or secured, according to law, shall be exempted from any forfeiture under this act, anything therein contained to the contrary notwithstanding.

SEC. 34. *And be it further enacted*, That the fees and allowances for the several duties and services, to be performed, in virtue of this act, shall be as follows : that is to say :<sup>1</sup>

For admeasuring every ship or vessel, in order to the enrolment, or licensing and recording the same, if of the burden of five tons, and less than twenty tons, fifty cents ; if of twenty tons, and not exceeding seventy tons, seventy-five cents ; if above seventy tons, and not exceeding one hundred tons, one hundred cents ; if above one hundred tons, one hundred and fifty cents :

For every certificate of enrolment, fifty cents :

For every indorsement on a certificate of enrolment, twenty cents :

<sup>1</sup> See act of 1864, c. 83.

For every license, and granting the same, including the bond, if not exceeding twenty tons, twenty-five cents ; if above twenty, and not more than one hundred tons, fifty cents ; and if more than one hundred tons, one hundred cents :

For every indorsement on a license, twenty cents :

For certifying manifests, and granting a permit for a licensed vessel to proceed from district to district, twenty-five cents, if less than fifty tons, and if above fifty tons, fifty cents :

For receiving a certified manifest, and granting a permit, on the arrival of such vessel, twenty-five cents, if less than fifty tons, and if above fifty tons, fifty cents :

For certifying manifests, and granting a permit for a registered vessel to proceed from district to district, one hundred and fifty cents :

For receiving a certified manifest, and granting a permit, on the arrival of such registered vessel, one hundred and fifty cents :

For granting a permit for a vessel, not belonging to a citizen or citizens of the United States, to proceed from district to district, and receiving the manifest, two hundred cents :

For receiving a manifest, and granting a permit, to unload, for such last-mentioned vessel, on her arrival in one district, from another district, two hundred cents :

For granting a permit for a vessel carrying on the fishery, to trade at a foreign port, twenty-five cents, and for the report and entry of any foreign goods imported in such vessel, twenty-five cents.

And where a surveyor shall certify a manifest, or grant a permit, or receive a certified manifest and grant a permit, the fees arising therefrom shall be received by him solely for his use. And all other fees arising, by virtue of this act, shall be received, and accounted for, by the collector, or, at his option, by the naval officer, where there is one, and where there is a collector, naval officer, and surveyor, shall be equally divided, monthly, between the said officers ; and where there is no naval officer, two thirds to the collector, and the other third to the surveyor ; and where there is only a collector, he shall receive the whole amount thereof, and where there is more than one surveyor in any district, each of them shall receive his proportionable part of such fees, as shall arise in the port, for which he is appointed : *Provided always*, That in all cases, where the tonnage of any ship or vessel shall be ascertained, by any person appointed for that purpose, such person shall be paid a reasonable compensation therefor, out of the fees aforesaid, before any distribution thereof, as aforesaid ; and every collector and naval officer, and every surveyor, who shall reside at a port where there is no collector, shall cause to be affixed, and constantly kept, in some conspicuous place of his office, a fair table of the rates of fees, demandable by this act.



SEC. 35. *And be it further enacted*, That all penalties and forfeitures, which shall be incurred by virtue and force of this act, shall and may be sued for, prosecuted and recovered, in like manner, as penalties and forfeitures, incurred by virtue of the act, intituled "An act to regulate the collection of the duties imposed by law on goods, wares, and merchandise imported into the United States, and on the tonnage of ships or vessels," may be sued for, prosecuted and recovered, and shall be appropriated in like manner: *Provided always*, That if any officer, entitled to a part or share of any such penalty or forfeiture, shall be necessary as a witness on the trial for such penalty or forfeiture, such officer may be a witness upon the said trial; but in such case, he shall not receive, or be entitled to any part or share of the said penalty or forfeiture, and the part or share to which he would otherwise have been entitled, shall accrue to the United States.

SEC. 36. *And be it further enacted*, That this act shall commence, and take effect, from and after the last day of May next, and thenceforth, the act, intituled "An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," and also, the act, intituled "An act to explain and amend an act, intituled An act for registering and clearing vessels, regulating the coasting trade, and for other purposes," shall be repealed, and cease to operate, except as to the validity of the registers, records, enrolments, and licenses, with the certificates and documents, which shall have been done or granted, in pursuance of those acts, prior to the first day of June next, which shall continue to be of the like force and effect, as if the said acts were not repealed; and except also, as to the prosecution, recovery, and distribution of, and for fines, penalties, and forfeitures, which may have been incurred prior to the first day of June next, for which purpose likewise, the said acts shall continue in force.

SEC. 37. *And be it further enacted*, That nothing in this act, shall be construed to extend to any boat or lighter, not being masted, or if masted, and not decked, employed in the harbor of any town or city.

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ACT OF 1796, CHAPTER 36 (1 U. S. Stats. at Large, 477).

*An Act for the Relief and Protection of American Seamen.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States, by and with the advice and consent of the Senate, be, and hereby is authorized to appoint two or more agents; the one of whom shall reside in the kingdom of Great Britain, and the others at such foreign ports, as the President of the United States shall direct. That the duty of the said

agents shall be, under the direction of the President of the United States, to inquire into the situation of such American citizens or others, sailing, conformably to the law of nations, under the protection of the American flag, as have been, or may hereafter be impressed or detained by any foreign power, to endeavor, by all legal means, to obtain the release of such American citizens or others, as aforesaid; and to render an account of all impressments and detentions whatever, from American vessels, to the executive of the United States.

SEC. 2. *And be it further enacted*, That if it should be expedient to employ an additional agent or agents, for the purposes authorized by this law, during the recess of the senate, the president alone be, and hereby is, authorized to appoint such agent or agents.

SEC. 3. *And be it further enacted*, That the President of the United States be, and he is hereby authorized to draw, annually, out of the treasury of the United States, a sum not exceeding fifteen thousand dollars, not otherwise appropriated, to be applied by him in such proportions as he shall direct, to the payment of the compensation of the said agents, for their services, and the incidental expenses attending the performance of the duties imposed on them by this act.

SEC. 4. *And be it further enacted*, That the collector of every district shall keep a book or books, in which, at the request of any seaman, being a citizen of the United States of America, and producing proof of his citizenship, authenticated in the manner hereinafter directed, he shall enter the name of such seaman, and shall deliver to him a certificate, in the following form, that is to say: "I, A. B., collector of the district of D., do hereby certify, That E. F., an American seaman, aged                years, or thereabouts, of the height of                feet                inches [describing the said seaman as particularly as may be], has, this day, produced to me proof in the act, intituled 'An act for the relief and protection of American seamen'; and, pursuant to the said act, I do hereby certify, that the said E. F. is a citizen of the United States of America. In witness whereof, I have hereunto set my hand and seal of office, this                day of                ."

And it shall be the duty of the collectors aforesaid to file and preserve the proofs of citizenship produced, as aforesaid: And for each certificate delivered, as aforesaid, the said collectors shall be entitled to receive from the seamen applying for the same the sum of twenty-five cents.

SEC. 5. And, in order that full and speedy information may be obtained of the seizure or detention, by any foreign power, of any seamen employed on board any ship or vessel of the United States, *Be it further enacted*, That it shall, and hereby is declared to be the duty of the master of every ship or vessel of the United States, any of the crew whereof shall have been impressed or detained by any foreign power, at the first port

at which such ship or vessel shall arrive, if such impressment or detention happened on the high seas, or if the same happened within any foreign port, then in the port in which the same happened, immediately to make a protest, stating the manner of such impressment or detention, by whom made, together with the name and place of residence of the person impressed or detained; distinguishing also, whether he was an American citizen, and if not, to what nation he belonged. And it shall be the duty of such master to transmit by post, or otherwise, every such protest made in a foreign country to the nearest consul or agent, or to the minister of the United States resident in such country, if any such there be; preserving a duplicate of such protest, to be by him sent, immediately after his arrival within the United States, to the secretary of state, together with information to whom the original protest was transmitted: And in case such protest shall be made within the United States, or in any foreign country, in which no consul, agent, or minister of the United States resides, the same shall, as soon thereafter as practicable, be transmitted by such master, by post, or otherwise, to the secretary of state.

SEC. 6. *And be it further enacted*, That a copy of this law be transmitted by the secretary of state to each of the ministers and consuls of the United States resident in foreign countries, and by the secretary of the treasury to the several collectors of the districts of the United States, whose duty it is hereby declared to be, from time to time, to make known the provisions of this law to all masters of ships and vessels of the United States entering or clearing at their several offices. And the master of every such ship or vessel shall, before he is admitted to an entry by any such collector, be required to declare on oath whether any of the crew of the ship or vessel under his command have been impressed or detained in the course of his voyage, and how far he has complied with the directions of this act; and every such master as shall wilfully neglect or refuse to make the declarations herein required, or to perform the duties enjoined by this act, shall forfeit and pay the sum of one hundred dollars. And it is hereby declared to be the duty of every such collector to prosecute for any forfeiture that may be incurred under this act.

SEC. 7. *And be it further enacted*, That the collector of every port of entry in the United States shall send a list of the seamen registered under this act, once every three months, to the secretary of state, together with an account of such impressments or detentions as shall appear, by the protests of the masters, to have taken place.

SEC. 8. *And be it further enacted*, That the first, second, and third sections of this act shall be in force for one year, and from thence to the end of the next session of Congress thereafter, and no longer.

## ACT OF 1796, CHAPTER 45 (1 U. S. Stats. at Large, 489).

*An Act providing Passports for the Ships and Vessels of the United States.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be the duty of the secretary of state to prepare a form, which, when approved by the president, shall be deemed the form of a passport for ships and vessels of the United States.

SEC. 2. *And be it further enacted,* That every ship and vessel of the United States, going to any foreign country, shall, before she departs from the United States, at the request of the master, be furnished by the collector for the district where such ship or vessel may be with a passport of the form prescribed and established, pursuant to the foregoing section; for which passport, the master of such ship or vessel shall pay to the said collector, ten dollars, to be accounted for by him; and in order to be entitled to such passport, the master of every such ship or vessel shall be bound with sufficient sureties, to the treasurer of the United States, in the penalty of two thousand dollars, conditioned, that the said passport shall not be applied to the use or protection of any other ship or vessel, than the one described in the same; and that, in case of the loss or sale of any ship or vessel having such passport, the same shall, within three months, be delivered up to the collector from whom it was received, if the loss or sale take place within the United States; or within six months, if the same shall happen at any place nearer than the Cape of Good Hope; and within eighteen months, if at a more distant place.

SEC. 3. *And be it further enacted,* That there shall be paid on every ship and vessel of the United States sailing or trading to any foreign country, other than some port or place in America, for each and every voyage, the sum of four dollars, to be received and accounted for, by the collector, at the time of clearing outward, if such vessel be bound direct to such foreign country, from any port of the United States, or at the time of entry in the United States, if such ship or vessel shall have sailed to such foreign country, from any port or place in America, other than of the United States.

SEC. 4. *And be it further enacted,* That if any ship or vessel of the United States, shall depart therefrom, after the first day of September next, and shall be bound to any foreign country, other than to some port or place in America, without such passport, the master of such ship or vessel shall forfeit and pay the sum of two hundred dollars for every such offence.

## ACT OF 1797, CHAPTER 7 (1 U. S. Stats. at Large, 498).

*An Act, in addition to an Act, intituled "An Act concerning the registering and recording of Ships or Vessels," and to an Act, intituled "An Act for enrolling and licensing Ships and Vessels employed in the Coasting Trade and Fisheries, and for regulating the same."*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever it shall appear, by satisfactory proof, to the secretary of the treasury, that any ship or vessel hath been sold and transferred by process of law ; and that the register, certificate of enrolment, or license, as the case may be, of such ship or vessel, is retained by the former owners, it shall be lawful for the said secretary, to order and direct the collector of the district to which such ship or vessel may belong, to grant a new register, certificate of enrolment, or license, as the case may be, on the owners, under such sale, complying with such terms and conditions, as are, by law, required for granting of such papers ; excepting only the delivering up of the former certificate of registry, enrolment, or license, as the case may be : *Provided nevertheless,* that nothing in this act contained, shall be construed to remove the liability of any person or persons to any penalty for not surrendering up the papers, belonging to any ship or vessel, on a transfer or sale of the same.

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## ACT OF 1797, CHAPTER 5 (1 U. S. Stats. at Large, 523).

*An Act in addition to an Act, intituled "An Act concerning the registering and recording of Ships and Vessels."*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no ship or vessel which has been, or shall be registered, pursuant to any law of the United States, and which hereafter shall be seized, or captured and condemned, under the authority of any foreign power, or that shall by sale become the property of a foreigner or foreigners, shall, after the passing of this act, be entitled to, or capable of receiving, a new register, notwithstanding such ship or vessel should afterwards become American property ; but that all such ships and vessels shall be taken and considered, to all intents and purposes, as foreign vessels : *Provided,* That nothing in this act contained, shall extend to, or be construed to affect the person or persons owning any ship or vessel, at the time of the seizure, or capture of the same, or shall prevent such owner, in case he regain a property in such ship or vessel, so condemned, by purchase or otherwise, from claiming and receiving a new register for the same, as he might or could have done, if this act had not been passed.

## ACT OF 1798, CHAPTER 77 (1 U. S. Stats. at Large, 605).

*An Act for the relief of sick and disabled Seamen.*<sup>1</sup>

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the first day of September next, the master or owner of every ship or vessel of the United States, arriving from a foreign port into any port of the United States, shall, before such ship or vessel shall be admitted to an entry, render to the collector a true account of the number of seamen, that shall have been employed on board such vessel since she was last entered at any port in the United States, — and shall pay to the said collector, at the rate of twenty cents per month for every seaman so employed; which sum he is hereby authorized to retain out of the wages of such seamen.

SEC. 2. *And be it further enacted,* That from and after the first day of September next, no collector shall grant to any ship or vessel whose enrolment or license for carrying on the coasting trade has expired, a new enrolment or license before the master of such ship or vessel shall first render a true account to the collector, of the number of seamen, and the time they have severally been employed on board such ship or vessel, during the continuance of the license which has so expired, and pay to such collector twenty cents per month for every month such seamen have been severally employed, as aforesaid; which sum the said master is hereby authorized to retain out of the wages of such seamen. And if any such master shall render a false account of the number of men, and the length of time they have severally been employed, as is herein required, he shall forfeit and pay one hundred dollars.

SEC. 3. *And be it further enacted,* That it shall be the duty of the several collectors to make a quarterly return of the sums collected by them, respectively, by virtue of this act, to the secretary of the treasury; and the President of the United States is hereby authorized, out of the same, to provide for the temporary relief and maintenance of sick or disabled seamen, in the hospitals or other proper institutions now established in the several ports of the United States, or, in ports where no such institutions exist, then in such other manner as he shall direct: *Provided,* that the moneys collected in any one district, shall be expended within the same.

SEC. 4. *And be it further enacted,* That if any surplus shall remain of the moneys to be collected by virtue of this act, after defraying the expense

<sup>1</sup> See Act of 1796, c. 36; Act of 1799, c. 36; Act of 1802, c. 51; Act of 1803, c. 9; Act of 1811, c. 26, 28; Act of 1843, c. 49; Act of 1846, c. 50; Act of 1864, c. 70.

of such temporary relief and support, that the same, together with such private donations as may be made for that purpose (which the president is hereby authorized to receive) shall be invested in the stock of the United States, under the direction of the president; and when, in his opinion, a sufficient fund shall be accumulated, he is hereby authorized to purchase or receive cessions or donations of ground or buildings, in the name of the United States, and to cause buildings, when necessary, to be erected as hospitals for the accommodation of sick and disabled seamen.

SEC 5. *And be it further enacted*, That the President of the United States be, and he is hereby authorized to nominate and appoint, in such ports of the United States, as he may think proper, one or more persons, to be called directors of the marine hospital of the United States, whose duty it shall be to direct the expenditure of the fund assigned for their respective ports, according to the third section of this act; to provide for the accommodation of sick and disabled seamen, under such general instructions as shall be given by the President of the United States, for that purpose, and also subject to the like general instructions, to direct and govern such hospitals as the president may direct to be built in the respective ports: and that the said directors shall hold their offices during the pleasure of the president, who is authorized to fill up all vacancies that may be occasioned by the death or removal of any of the persons so to be appointed. And the said directors shall render an account of the moneys received and expended by them, once in every quarter of a year, to the secretary of the treasury, or such other person as the president shall direct; but no other allowance or compensation shall be made to the said directors, except the payment of such expenses as they may incur in the actual discharge of the duties required by this act.

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ACT OF 1799, CHAPTER 36 (1 U. S. Stats. at Large, 729).

*An Act in addition to "An Act for the relief of sick and disabled Seamen."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States shall be, and he hereby is authorized to direct the expenditure of any moneys which have been or shall be collected by virtue of an act, intitled "An Act for the relief of sick and disabled seamen," to be made within the State wherein the same shall have been collected, or within the State next adjoining thereto, excepting what may be collected in the States of New Hampshire, Massachusetts, Rhode Island, and Connecticut; anything in the said act contained to the contrary thereof, notwithstanding.

SEC. 2. *And be it further enacted*, That the secretary of the navy shall be, and he hereby is authorized and directed to deduct, after the first day of September next, from the pay thereafter to become due, of the officers, seamen, and marines of the navy of the United States, at the rate of twenty cents per month, for every such officer, seamen, and marine, and to pay the same quarter annually to the secretary of the treasury, to be applied to the same purposes, as the money collected by virtue of the above-mentioned act is appropriated.

SEC. 3. *And be it further enacted*, That the officers, seamen, and marines of the navy of the United States, shall be entitled to receive the same benefits and advantages, as by the act above mentioned are provided for the relief of the sick and disabled seamen of the merchant vessels of the United States.

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ACT OF 1802, CHAPTER 51 (2 U. S. Stats. at Large, 192).

*An Act to amend an Act intituled "An Act for the Relief of sick and disabled Seamen," and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the moneys heretofore collected in pursuance of the several acts "for the relief of sick and disabled seamen," and at present unexpended, together with the moneys hereafter to be collected by authority of the before-mentioned acts, shall constitute a general fund, which the President of the United States shall use and employ as circumstances shall require, for the benefit and convenience of sick and disabled American seamen: *Provided*, that the sum of fifteen thousand dollars be, and the same is hereby appropriated for the erection of an hospital in the district of Massachusetts.

SEC. 2. *And be it further enacted*, That it shall be lawful for the President of the United States to cause such measures to be taken as, in his opinion, may be expedient for providing convenient accommodations, medical assistance, necessary attendance, and supplies for the relief of sick or disabled seamen of the United States, who may be at or near the port of New Orleans, in case the same can be done with the assent of the government having jurisdiction over the port; and for this purpose, to establish such regulations, and to authorize the employment of such persons as he may judge proper; and that for defraying the expense thereof, a sum not exceeding three thousand dollars be paid out of any moneys arising from the said fund not otherwise appropriated.

SEC. 3. *And be it further enacted*, That from and after the thirtieth day



of June next, the master of every boat, raft, or flat, belonging to any citizen of the United States, which shall go down the Mississippi with intention to proceed to New Orleans, shall, on his arrival at Fort Adams, render to the collector or naval officer thereof, a true account of the number of persons employed on board such boat, raft, or flat, and the time that each person has been so employed, and shall pay to the said collector or naval officer at the rate of twenty cents per month, for every person so employed, which sum, he is hereby authorized to retain out of the wages of such person: and the said collector or naval officer shall not give a clearance for such boat, raft, or flat, to proceed on her voyage to New Orleans, until an account be rendered to him of the number of persons employed on board such boat, raft, or flat, and the money paid to him by the master or owner thereof: and if any such master shall render a false account of the number of persons, and the length of time they have severally been employed, as is herein required, he shall forfeit and pay fifty dollars, which shall be applied to, and shall make a part of, the said general fund for the purposes of this act: *Provided*, that all persons employed in navigating any such boat, raft, or flat, shall be considered as seamen of the United States, and entitled to the relief extended by law to sick and disabled seamen.

SEC. 4. *And be it further enacted*, That the President of the United States be, and he is hereby authorized to nominate and appoint for the port of New Orleans, a fit person to be director of the marine hospital of the United States, whose duties shall be in all instances the same as the directors of the marine hospitals of the United States, as directed and required by the act, intituled "An act for the relief of sick and disabled seamen." [Act of July 16, 1798, chap. 76.]

SEC. 5. *And be it further enacted*, That each and every director of the marine hospitals within the United States shall, if it can with convenience be done, admit into the hospital of which he is director, sick foreign seamen, on the application of the master or commander of any foreign vessel to which such sick seamen may belong; and each seaman so admitted shall be subject to a charge of seventy-five cents per day for each day he may remain in the hospital, the payment of which the master or commander of such foreign vessel shall make to the collector of the district in which such hospital is situated: and the collector shall not grant a clearance to any foreign vessel, until the money due from such master or commander, in manner and form aforesaid, shall be paid; and the director of each hospital is hereby directed, under the penalty of fifty dollars, to make out the accounts against each foreign seaman that may be placed in the hospital, under his direction, and render the same to the collector.

SEC. 6. *And be it further enacted*, That the collectors shall pay the money collected, by virtue of this and the act to which this is an amend-

ment, into the treasury of the United States, and be accountable therefor, and receive the same commission thereon as for other money by them collected.

SEC. 7. *And be it further enacted*, That each and every director of the marine hospitals shall be accountable at the treasury of the United States for the money by them received in the same manner as other receivers of public money, and for the sums by them expended shall be allowed a commission at the rate of one per cent.

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ACT OF 1803, CHAPTER 9 (2 U. S. Stats. at Large, 203).

*An Act supplementary to the "Act concerning Consuls and Vice-Consuls, and for the further Protection of American Seamen."*<sup>1</sup>

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That before a clearance be granted to any vessel bound on a foreign voyage, the master thereof shall deliver to the collector of the customs, a list, containing the names, places of birth and residence, and a description of the persons who compose his ship's company, to which list the oath or affirmation of the captain shall be annexed, that the said list contains the names of his crew, together with the places of their birth and residence, as far as he can ascertain them, and the said collector shall deliver him a certified copy thereof, for which the collector shall be entitled to receive the sum of twenty-five cents; and the said master shall moreover enter into bond with sufficient security, in the sum of four hundred dollars, that he shall exhibit the aforesaid certified copy of the list to the first boarding officer, at the first port in the United States, at which he shall arrive on his return thereto, and then and there also produce the persons named therein, to the said boarding officer, whose duty it shall be to examine the men with such list, and to report the same to the collector, and it shall be the duty of the collector at the said port of arrival (where the same is different from the port from which the vessel originally sailed), to transmit a copy of the list so reported to him, to the collector of the port from which said vessel originally sailed: *Provided*, that the said bond shall not be forfeited on account of the said master not producing to the first boarding officer, as aforesaid, any of the persons contained in the said list, who may be discharged in a foreign country with the consent of the consul, vice-consul, commercial agent, or vice-commercial agent there residing, signified in writing, under his hand and official seal, to be produced to the collector with the other persons composing the crew as aforesaid; nor on account

<sup>1</sup> See ante, p. 559, n. 1; Act of 1840, c. 48; Act of 1856, c. 127, §§ 25 - 27.

of any such person dying or absconding, or being forcibly impressed into other service, of which satisfactory proof shall be then also exhibited to the collector.

SEC. 2. *And be it further enacted*, That it shall be the duty of every master or commander of a ship or vessel, belonging to citizens of the United States, who shall sail from any port of the United States, after the first day of May next, on his arrival at a foreign port, to deposit his register, sea letter, and Mediterranean passport with the consul, vice-consul, commercial agent, or vice-commercial agent (if any there be at such port); that in case of refusal or neglect of the said master or commander to deposit the said papers as aforesaid, he shall forfeit and pay five hundred dollars, to be recovered by the said consul, vice-consul, commercial agent, or vice-commercial agent, in his own name, for the benefit of the United States, in any court of competent jurisdiction; and it shall be the duty of such consul, vice-consul, commercial agent, or vice-commercial agent, on such master or commander producing to him a clearance from the proper officer of the port, where his ship or vessel may be, to deliver to the said master or commander all of his said papers; *Provided*, such master or commander shall have complied with the provisions contained in this act, and those of the act to which this is a supplement.

SEC. 3. *And be it further enacted*, That whenever a ship or vessel belonging to a citizen of the United States, shall be sold in a foreign country, and her company discharged, or when a seaman or mariner, a citizen of the United States, shall, with his own consent, be discharged in a foreign country, it shall be the duty of the master or commander to produce to the consul, vice consul, commercial agent, or vice-commercial agent, the list of his ship's company, certified as aforesaid; and to pay to such consul, vice-consul, commercial agent, or vice-commercial agent, for every seaman or mariner so discharged, being designated on such list as a citizen of the United States, three months' pay, over and above the wages which may then be due to such mariner or seaman, two thirds thereof to be paid by such consul, or commercial agent, to each seaman or mariner so discharged, upon his engagement on board of any vessel to return to the United States, and the other remaining third to be retained for the purpose of creating a fund for the payment of the passages of seamen or mariners, citizens of the United States, who may be desirous of returning to the United States, and for the maintenance of American seamen who may be destitute, and may be in such foreign port, and the several sums retained for such fund shall be accounted for with the treasury every six months by the persons receiving the same.

SEC. 4. *And be it further enacted*, That it shall be the duty of the consuls, vice-consuls, commercial agents, vice-commercial agents of the United

States, from time to time, to provide for the mariners and seamen of the United States, who may be found destitute within their districts respectively, sufficient subsistence and passages to some port in the United States, in the most reasonable manner, at the expense of the United States, subject to such instructions as the secretary of state shall give; and that all masters and commanders of vessels belonging to citizens of the United States, and bound to some port of the same, are hereby required and enjoined to take such mariners or seamen on board of their ships or vessels, at the request of the said consuls, vice-consuls, commercial agents, or vice-commercial agents respectively, and to transport them to the port in the United States to which such ships or vessels may be bound, on such terms, not exceeding ten dollars for each person, as may be agreed between the said master and consul or commercial agent. And the said mariners or seamen shall, if able, be bound to do duty on board such ships or vessels according to their several abilities: *Provided*, that no master or captain of any ship or vessel shall be obliged to take a greater number than two men to every one hundred tons burden of the said ship or vessel, on any one voyage; and if any such captain or master shall refuse the same on the request or order of the consul, vice-consul, commercial agent, or vice-commercial agent, such captain or master shall forfeit and pay the sum of one hundred dollars for each mariner or seaman so refused, to be recovered for the benefit of the United States in any court of competent jurisdiction. And the certificate of any such consul or commercial agent, given under his hand and official seal, shall be *prima facie* evidence of such refusal in any court of law having jurisdiction for the recovery of the penalty aforesaid.

SEC. 5. *And be it further enacted*, That the seventh and eighth sections of the act intituled "An act concerning consuls and vice-consuls," (1792, c. 24.) be and the same are hereby repealed; and that the secretary of state be authorized to reimburse the consuls, vice-consuls, commercial agents, or vice-commercial agents, such reasonable sums as they may heretofore have advanced for the relief of seamen, though the same should exceed the rate of twelve cents a man per diem.

SEC. 6. *And be it further enacted*, That it shall and may be lawful for every consul, vice-consul, commercial agent, and vice-commercial agent of the United States, to take and receive for every certificate of discharge of any seaman or mariner in a foreign port fifty cents; and for commission on paying and receiving the amount of wages payable on the discharge of seamen in foreign ports, two and a half per centum.

SEC. 7. *And be it further enacted*, That if any consul, vice-consul, commercial agent, or vice-commercial agent, shall falsely and knowingly certify that property belonging to foreigners is property belonging to citizens

of the United States, he shall, on conviction thereof, in any court of competent jurisdiction, forfeit and pay a fine not exceeding ten thousand dollars, at the discretion of the court, and be imprisoned for any term not exceeding three years.

SEC. 8. *And be it further enacted*, That if any consul, vice-consul, commercial agent, or vice-commercial agent, shall grant a passport or other paper certifying that any alien, knowing him or her to be such, is a citizen of the United States, he shall, on conviction thereof, in any court of competent jurisdiction, forfeit and pay a fine not exceeding one thousand dollars.

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ACT OF 1803, CHAPTER 16 (2 U. S. Stats. at Large, 208).

*An Act supplementary to the Act, intituled "An Act providing Passports for the Ships and Vessels of the United States."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every unregistered ship or vessel owned by a citizen or citizens of the United States, and sailing with a sea-letter, going to any foreign country, shall, before she departs from the United States, at the request of the master, be furnished by the collector of the district where such vessel may be, with a passport of the form prescribed and established by the act to which this is a supplement, for which the master shall pay to the collector ten dollars, and be subject to the rules and conditions prescribed in the said act, for ships and vessels of the United States.

SEC. 2. *And be it further enacted*, That there shall be paid on every such unregistered ship or vessel, sailing or trading to any foreign country, other than some port or place in America, for each and every voyage, the same sum at the time of clearing outwards, to be received and accounted for in the same manner as is by said act required in cases of ships and vessels of the United States.

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ACT OF 1803, CHAPTER 18 (2 U. S. Stats. at Large, 209).

*An Act in addition to the Act intituled "An Act concerning the registering and recording of Ships and Vessels of the United States," And to the Act, intituled "An Act to regulate the Collection of Duties on Imports and Tonnage."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That if any person shall knowingly make, utter, or publish any false sea-letter, Mediterranean passport, or certificate of registry, or shall knowingly avail himself of any such Mediterranean passport, sea-letter, or certificate of registry,

he shall forfeit and pay a sum not exceeding five thousand dollars, to be recovered by action of debt, in the name of the United States, in any court of competent jurisdiction; and if an officer of the United States, he shall forever thereafter be rendered incapable of holding any office of trust or profit, under the authority of the United States.

SEC. 2. *And be it further enacted*, That it shall be the duty of the comptroller of the treasury, to cause to be provided, blank certificates of registry, with such water and other secret marks as he may direct, which marks shall be made known only to the collectors and their deputies, and to the consuls or commercial agents of the United States; and from and after the thirty-first day of December next, no certificate of registry shall be issued, except such as shall have been provided and marked as aforesaid; and the ships or vessels of the United States, which shall have been duly registered as such, shall be entitled to new certificates of registry (*gratis*) in exchange for their old certificates of registry: and it shall be the duty of the respective collectors, on the departure of any such ship or vessel, after the said thirty-first day of December, from the district to which such ship or vessel shall belong, to issue a new certificate accordingly, and to retain and deface the former certificate.

SEC. 3. *And be it further enacted*, That when any ship or vessel, which has been, or which shall be registered pursuant to any law of the United States, shall, whilst such ship or vessel is without the limits of the United States, be sold or transferred in whole or in part to a citizen or citizens of the said States, such ship or vessel, on her first arrival in the United States thereafter, shall be entitled to all the privileges and benefits of a ship or vessel of the United States: *Provided*, that all the requisites of law, in order to the registry of ships or vessels, shall be complied with, and a new certificate of registry obtained for such ship or vessel, within three days from the time at which the master, or other person having the charge or command of such ship or vessel, is required to make his final report upon her first arrival afterwards, as aforesaid, agreeably to the thirtieth section of the act, passed on the second day of March, one thousand seven hundred and ninety-nine, intituled "An act to regulate the collection of duties on imports and tonnage." And it shall be lawful to pay to the collector of the district within which such ship or vessel may arrive as aforesaid, the duties imposed by law on the tonnage of such ship or vessel, at any time within three days from the time at which the master or other person having the charge or command of such ship or vessel, is required to make his final report as aforesaid, anything to the contrary in any former law notwithstanding: *Provided always*, that nothing herein contained shall be construed to repeal, or in any wise change the provisions, restrictions, or limitations of any former act or acts, excepting so far as the same shall be repugnant to the provisions of this act.

SEC. 4. *And be it further enacted*, That the power vested in the secretary of the treasury, to remove disabilities incurred under the act to which this is a supplement, and under the act, intituled "An act for enrolling and licensing ships or vessels, to be employed in the coasting trade and fisheries, and for regulating the same," shall extend to the remission of any foreign duties, which shall have been or shall be incurred by reason of such disabilities.

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ACT OF 1804, CHAPTER 40 (2 U. S. Stats. at Large, 290).

*An Act in addition to the Act intituled "An Act for the Punishment of certain Crimes against the United States."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person, not being an owner, who shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or other vessel unto which he belongeth, being the property of any citizen or citizens of the United States, or procure the same to be done, and being thereof lawfully convicted, shall suffer death.

SEC. 2. *Be it further enacted*, That if any person shall, on the high seas, wilfully and corruptly cast away, burn, or otherwise destroy any ship or vessel of which he is owner, in part or in whole, or in any wise direct or procure the same to be done, with intent or design to prejudice any person or persons that hath underwritten, or shall underwrite any policy or policies of insurance thereon, or if any merchant or merchants that shall load goods thereon, or of any other owner or owners of such ship or vessel, the person or persons offending therein being thereof lawfully convicted, shall be deemed and adjudged guilty of felony, and shall suffer death.

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ACT OF 1804, CHAPTER 52 (2 U. S. Stats. at Large, 296).

*An Act to amend the Act intituled "An Act concerning the registering and recording of Ships and Vessels."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no ship or vessel shall be entitled to be registered as a ship or vessel of the United States, or, if registered, to the benefits thereof, if owned in whole or in part by any person naturalized in the United States, and residing for more than one year in the country from which he originated, or for more than two years in any foreign country, unless such person be in the capacity of a consul or other public agent of the United States: *Provided*, that nothing herein contained shall be construed to prevent the registering anew of any ship or vessel be-

fore registered, in case of a *bond fide* sale thereof to any citizen or citizens resident in the United States: *And provided also*, that satisfactory proof of the citizenship of the person on whose account a vessel may be purchased, shall be first exhibited to the collector, before a new register shall be granted for such vessel.

SEC. 2. *And be it further enacted*, That the proviso in the act, intituled "An act in addition to an act, intituled An act concerning the registering and recording of ships and vessels," passed the twenty-seventh of June, one thousand seven hundred and ninety-seven, shall be taken and deemed to extend to the executors or administrators of the owner or owners of vessels, in the said proviso described.

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ACT OF 1805, CHAPTER 28 (2 U. S. Stats. at Large, 330).

*An Act to amend the Act intituled "An Act for the Government and Regulation of Seamen in the Merchants' Service."*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the provisions, regulations, and penalties which are contained in the eighth session of the act, intituled "An act for the government and regulation of seamen in the merchants' service," so far as relates to a chest of medicines to be provided for vessels of one hundred and fifty tons burden and upwards, shall be extended to all merchant vessels of the burden of seventy-five tons, or upwards, navigated with six persons or more, in the whole, and bound from the United States to any port or ports in the West Indies.

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ACT OF 1810, CHAPTER 19 (2 U. S. Stats. at Large, 568).

*An Act to prevent the issuing of Sea Letters except to certain Vessels.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the thirtieth of June next, no sea letter or other document certifying or proving any ship or vessel to be the property of a citizen or citizens of the United States, shall be issued except to ships or vessels duly registered, or enrolled and licensed as ships or vessels of the United States, or to vessels which at that time shall be wholly owned by citizens of the United States, and furnished with or entitled to sea letters or other custom-house documents, any law or laws heretofore passed to the contrary notwithstanding: *Provided nevertheless*, that no sea letter shall be issued to any vessel which shall not at this time be furnished or entitled to a sea letter, unless such vessel shall return to some port or place in the United States or territories



thereof on or before the said thirtieth day of June next: *Provided nevertheless*, that no sea letter or other document, certifying or proving any ship or vessel to be the property of a citizen or citizens of the United States, shall be issued to any vessel now abroad, which shall not at this time be furnished or entitled to a sea letter, unless such vessel shall arrive at some port or place in the United States or territories thereof, on or before the said thirtieth day of June next; and provided that nothing herein contained shall be construed to operate against any such vessel or vessels that now are, or may be, prior to the said thirtieth of June, detained abroad by the authority of any foreign power.

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ACT OF 1811, CHAPTER 26 (2 U. S. Stats. at Large, 650).

*An Act establishing Navy Hospitals.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the money hereafter collected by virtue of the act, intituled "An act in addition to an act for the relief of sick and disabled seamen," shall be paid to the secretary of the navy, the secretary of the treasury, and the secretary of war, for the time being, who are hereby appointed a board of commissioners, by the name and style of commissioners of navy hospitals, which, together with the sum of fifty thousand dollars hereby appropriated out of the unexpended balance of the marine hospital fund, to be paid to the commissioners aforesaid, shall constitute a fund for navy hospitals.

SEC. 2. *And be it further enacted*, That all fines imposed on navy officers, seamen, and marines, shall be paid to the commissioners of navy hospitals.

SEC. 3. *And be it further enacted*, That the commissioners of navy hospitals be and they are hereby authorized and required to procure at a suitable place or places proper sites for navy hospitals, and if the necessary buildings are not procured with the site, to cause such to be erected, having due regard to economy, and giving preference to such plans as with most convenience and least cost will admit of subsequent additions, as the funds will permit and circumstances require; and the commissioners are required at one of the establishments, to provide a permanent asylum for disabled and decrepid navy officers, seamen, and marines.

SEC. 4. *And be it further enacted*, That the secretary of the navy be authorized and required to prepare the necessary rules and regulations for the government of the institution, and report the same to the next session of Congress.

SEC. 5. *And be it further enacted*, That when any navy officer, seaman,

or marine, shall be admitted into a navy hospital, that the institution shall be allowed one ration per day during his continuance therein, to be deducted from the account of the United States with such officer, seaman, or marine; and in like manner, when any officer, seaman, or marine, entitled to a pension, shall be admitted into a navy hospital, such pension during his continuance therein shall be paid to the commissioners of the navy hospitals, and deducted from the account of such pensioner.

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ACT OF 1811, CHAPTER 28 (2 U. S. Stats. at Large, 651).

*An Act in addition to the Act, intituled "An Act supplementary to the Act concerning Consuls and Vice-Consuls," and for the further Protection of American Seamen.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in all cases where distressed mariners and seamen of the United States have been transported from foreign ports, where there was no consul, vice-consul, commercial agent, or vice-commercial agent of the United States, to ports of the United States, and in all cases where they shall hereafter be so transported, there shall be allowed to the master or owner of each vessel, in which they shall or may have been transported, such reasonable compensation, in addition to the allowance now fixed by law, as shall be deemed equitable by the comptroller of the treasury.

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ACT OF 1812, CHAPTER 40 (2 U. S. Stats. at Large, 694).

*An Act respecting the enrolling and licensing of Steamboats.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That from and after the passing of this act, a steamboat employed, or intended to be employed only in a river or bay of the United States, owned wholly or in part by an alien, resident within the United States, may, and shall be enrolled and licensed, as if the same belonged to a citizen of the United States, according to, and subject to all the conditions, limitations, and provisions contained in the act, intituled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," except that, in such case, no oath or affirmation shall be required that the said boat belongs to a citizen or citizens of the United States.

SEC. 2. *And be it further enacted,* That the owner or owners of such steamboat, upon application for enrolment or license, shall give bond to the

collector of the district, to and for the use of the United States, in the penalty of one thousand dollars, with sufficient surety, conditioned, that the said boat shall not be employed in other waters than the rivers and bays of the United States.

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ACT OF 1813, CHAPTER 42 (2 U. S. Stat. at Large, 809).

*An Act for the Regulation of Seamen on board the Public and Private Vessels of the United States.*<sup>1</sup>

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ on board any of the public or private vessels of the United States any person or persons except citizens of the United States, or persons of color, natives of the United States.

SEC. 2. *And be it further enacted,* That from and after the time when this act shall take effect, it shall not be lawful to employ as aforesaid, any naturalized citizen of the United States, unless such citizen shall produce to the commander of the public vessel, if to be employed on board such vessel, or to a collector of the customs, a certified copy of the act by which he shall have been naturalized, setting forth such naturalization and the time thereof.

SEC. 3. *And be it further enacted,* That in all cases of private vessels of the United States sailing from a port in the United States to a foreign port, the list of the crew, made as heretofore directed by law, shall be examined by the collector for the district from which the vessel shall clear out, and, if approved of by him, shall be certified accordingly. And no person shall be admitted or employed as aforesaid, on board of any vessel aforesaid, unless his name shall have been entered in the list of the crew, approved and certified by the collector for the district from which the vessel shall clear out as aforesaid. And the said collector, before he delivers the list of the crew, approved and certified as aforesaid, to the captain, master, or proper officer of the vessel to which the same belongs, shall cause the same to be recorded in a book by him for that purpose to be provided, and the said record shall be open for the inspection of all persons, and a certified copy thereof shall be admitted in evidence in any court in which any question may arise, under any of the provisions of this act.

SEC. 4. *And be it further enacted,* That the President of the United

<sup>1</sup> See Act of 1864, c. 170.

States be, and he hereby is authorized from time to time to make such further regulations, and to give such directions to the several commanders of public vessels, and to the several collectors, as may be proper and necessary respecting the proofs of citizenship, to be exhibited to the commanders or collectors aforesaid : *Provided*, That nothing contained in such regulations or directions shall be repugnant to any of the provisions of this act.

SEC. 5. *And be it further enacted*, That from and after the time when this act shall take effect, no seaman or other seafaring man, not being a citizen of the United States, shall be admitted or received as a passenger on board of any public or private vessel of the United States, in a foreign port, without permission in writing from the proper officers of the country of which such seaman or seafaring man may be subject or citizen.

SEC. 6. *And be it further enacted*, That from and after the time when this act shall take effect, the consuls or commercial agents of any nation at peace with the United States shall be admitted (under such regulations as may be prescribed by the President of the United States) to state their objections to the proper commander or collector as aforesaid, against the employment of any seaman or sea-faring man on board of any public or private vessel of the United States, on account of his being a native subject or citizen of such nation, and not embraced within the description of persons who may be lawfully employed, according to the provisions of this act ; and the said consuls or commercial agents shall also be admitted under the said regulations, to be present at the time when the proofs of citizenship of the persons against whom such objections may have been made, shall be investigated by such commander or collector.

SEC. 7. *And be it further enacted*, That if any commander of a public vessel of the United States shall knowingly employ or permit to be employed, or shall admit or receive, or permit to be admitted or received, on board his vessel, any person whose employment or admission is prohibited by the provisions of this act, he shall on conviction thereof forfeit and pay the sum of one thousand dollars for each person thus unlawfully employed or admitted on board such vessel.

SEC. 8. *And be it further enacted*, That if any person shall, contrary to the prohibitions of this act, be employed, or be received on board of any private vessel, the master or commander, and the owner or owners of such vessel, knowing thereof, shall respectively forfeit and pay five hundred dollars for each person thus unlawfully employed or received in any one voyage ; which sum or sums shall be recovered, although such seaman or person shall have been admitted and entered in the certified list of the crew aforesaid, by the collector for the district to which the vessel may belong : and all penalties and forfeitures arising under or incurred by virtue of this act, may be sued for, prosecuted, and recovered, with costs of suit by action

of debt, and shall accrue and be one moiety thereof to the use of the person who shall sue for the same, and the other moiety thereof to the use of the United States.

SEC. 9. *And be it further enacted*, That nothing in this act contained shall be construed to prohibit any commander or master of a public or private vessel of the United States, whilst in a foreign port or place, from receiving any American seaman in conformity to law, or supplying any deficiency of seamen on board such vessel, by employing American seamen, or subjects of such foreign country, the employment of whom shall not be prohibited by the laws thereof.

SEC. 10. *And be it further enacted*, That the provisions of this act shall have no effect or operation with respect to the employment as seamen of the subjects or citizens of any foreign nation which shall not, by treaty or special convention with the government of the United States, have prohibited on board of her public and private vessels the employment of native citizens of the United States, who have not become a citizen or subject of such nation.

SEC. 11. *And be it further enacted*, That nothing in this act contained shall be so construed as to prevent any arrangement between the United States and any foreign nation, which may take place under any treaty or convention, made and ratified in the manner prescribed by the Constitution of the United States.

SEC. 12. *And be it further enacted*, That no person who shall arrive in the United States, from and after the time when this act shall take effect, shall be admitted to become a citizen of the United States, who shall not for the continued term of five years next preceding his admission as aforesaid have resided within the United States [without being at any time during the said five years, out of the territory of the United States].<sup>1</sup>

SEC. 13. *And be it further enacted*, That if any person shall falsely make, forge, or counterfeit, or cause, or procure to be falsely made, forged, or counterfeited, any certificate or evidence of citizenship referred to in this act; or shall pass, utter, or use as true, any false, forged, or counterfeited certificate of citizenship, or shall make sale or dispose of any certificate of citizenship to any person other than the person for whom it was originally issued, and to whom it may of right belong, every such person shall be deemed and adjudged guilty of felony; and on being thereof convicted by due course of law, shall be sentenced to be imprisoned and kept to hard labor for a period not less than three, or more than five years, or be fined in a sum not less than five hundred dollars, nor more than one thousand dollars, at the discretion of the court taking cognizance thereof.

SEC. 14. *And be it further enacted*, That no suit shall be brought for

<sup>1</sup> The clause in brackets is repealed by Act of 1848, c. 72.

any forfeiture or penalty incurred under the provisions of this act unless the suit be commenced within three years from the time of the forfeiture.

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ACT OF 1813, CHAPTER 2 (3 U. S. Stats. at Large, 2).

*An Act for the Government of Persons in certain Fisheries.*<sup>1</sup>

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the master or skipper of any vessel of the burden of twenty tons or upwards, qualified according to law for carrying on the bank and other cod fisheries, bound from a port of the United States to be employed in any such fishery, at sea, shall, before proceeding on such fishing voyage, make an agreement in writing or print with every fisherman who may be employed therein (except only an apprentice or servant of himself or owner), and in addition to such terms of shipment as may be agreed on, shall in such agreement express whether the same is to continue for one voyage or for the fishing season, and shall also express that the fish or the proceeds of such fishing voyage or voyages, which may appertain to the fishermen, shall be divided among them in proportion to the quantities or number of said fish which they may respectively have caught; which agreement shall be indorsed or countersigned by the owner of such fishing vessel or his agent. And if any fisherman, having engaged himself for a voyage or for the fishing season, in any fishing vessel, and signed an agreement therefor, as aforesaid, shall thereafter and while such agreement remains in force and to be performed, desert or absent himself from such vessel without leave of the master or skipper thereof, or of the owner or his agent, such deserter shall be liable to the same penalties as deserting seamen or mariners are subject to in the merchant service, and may in the like manner, and upon the like complaint and proof, be apprehended and detained; and all costs of process and commitment, if paid by the master or owner, shall be deducted out of the share of fish, or proceeds of any fishing voyage to which such deserter had or shall become entitled. And any fisherman, having engaged himself as aforesaid, who shall during such fishing voyage refuse or neglect his proper duty on board the fishing vessel, being thereto ordered or required by the master or skipper thereof, or shall otherwise resist his just commands to the hinderance or detriment of such voyage, besides being answerable for all damages arising thereby, shall forfeit to the use of the owner of such vessel his share of any public allowance which may be paid upon such voyage.

<sup>1</sup> See Act of 1865, c. 117.

SEC. 2. *And be it further enacted*, That where an agreement or contract shall be so made and signed for a fishing voyage or for the fishing season, and any fish which may have been caught on board such vessel during the same, shall be delivered to the owner or to his agent for cure, and shall be sold by said owner or agent, such vessel shall, for the term of six months after such sale, be liable and answerable for the skipper's and every other fisherman's share of such fish, and may be proceeded against in the same form and to the same effect as any other vessel is by law liable, and may be proceeded against for the wages of seamen or mariners in the merchant service. And upon such process for the value of a share or shares of the proceeds of fish delivered and sold as aforesaid, it shall be incumbent on the owner or his agent to produce a just account of the sales and division of such fish according to such agreement or contract; otherwise the said vessel shall be answerable upon such process for what may be the highest value of the share or shares demanded. But in all cases the owner of such vessel or his agent, appearing to answer to such process, may offer thereupon his account of general supplies made for such fishing voyage and of other supplies therefor made to either of the demandants, and shall be allowed to produce evidence thereof in answer to their demands respectively; and judgment shall be rendered upon such process for the respective balances which upon such an inquiry shall appear: *Provided always*, That when process shall be issued against any vessel liable as aforesaid, if the owner thereof, or his agent, will give bond to each fisherman in whose favor such process shall be instituted with sufficient security, to the satisfaction of two justices of the peace, one of whom shall be named by such owner or agent, and the other by the fisherman or fishermen pursuing such process, or if either party shall refuse, then the justice first appointed shall name his associate, with condition to answer and pay whatever sum shall be recovered by him or them on such process, there shall be an immediate discharge of such vessel: *Provided*, That nothing herein contained shall prevent any fisherman from having his action at common law for his share or shares of fish or the proceeds thereof as aforesaid.

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ACT OF 1813, CHAPTER 35 (3 U. S. Stats. at Large, 49).

*An Act laying a Duty on imported Salt; granting a Bounty on Pickled Fish exported, and Allowances to certain Vessels employed in the Fisheries.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That from and after the first day of January next, a duty of twenty cents per bushel shall be laid, imposed, and collected, upon all salt imported from any foreign port or

place into the United States. In calculating the said duty, every fifty-six pounds of salt shall be computed as equal to one bushel. And the said duty shall be collected in the same manner, and under the same regulations as other duties laid on the importation of foreign goods, wares, and merchandise, into the United States: *Provided*, That drawback shall in no case be allowed, and the term of credit for the payment of duties shall be nine months.

SEC. 2. *And be it further enacted*, That on all pickled fish<sup>1</sup> of the fisheries of the United States, exported therefrom subsequent to the last day of December, one thousand eight hundred and fourteen, there shall be allowed and paid a bounty of twenty cents per barrel, to be paid by the collector of the district from which the same shall be so exported, without any deduction or abatement: *Provided always*, That in order to entitle the exporter or exporters of such pickled fish to the benefit of such bounty or allowance, the said exporter or exporters shall make entry with the collector and naval officer of the district from whence the said pickled fish are intended to be exported; and shall specify in such entry the names of the master and vessel in which, and the place where such fish are intended to be exported, together with the particular quantity, and proof shall be made to the satisfaction of the collector of the district from which such pickled fish are intended to be exported, and of the naval officer thereof, if any, that the same are of the fisheries of the United States; and no entry shall be received, as aforesaid, of any pickled fish which have not been inspected and marked pursuant to the inspection laws of the respective States where inspection laws are in force, in regard to any pickled fish, and the casks containing such fish shall be branded with the words "for bounty," with the name of the inspector or packer, the species and quality of the fish contained therein, and the name of the port of exportation; and the collector of such district shall, together with the naval officer, where there is one, grant an order or permit for an inspector to examine the pickled fish as expressed in such entry, and if they correspond therewith, and the said officer is fully satisfied that they are of the fisheries of the United States, to lade the same agreeably to such entry, on board the ship or vessel therein expressed; which lading shall be performed under the superintendence of the officer examining the same, who shall make returns of the quantity and quality of pickled fish so laden on board, in virtue of such order or permit, to the officer or officers granting the same. And the said exporter or exporters, when the lading is completed, and after returns thereof have been made as above directed, shall make oath or affirmation, that the pickled fish expressed in such entry, and then actually laden on

<sup>1</sup> See Act of 1846, c. 74, § 5; Act of 1816, c. 14.



board the ship or vessel as therein expressed, are truly and *bond fide* of the fisheries of the United States, that they are truly intended to be exported as therein specified, and are not intended to be relanded within the limits of the United States; and shall also give bond in double the amount of the bounty or allowance to be received, with one or more sureties to the satisfaction of the collector of the port or place from which the said pickled fish are intended to be exported, conditioned that the same shall be landed and left at some foreign port or place without the limits aforesaid; which bonds shall be cancelled at the same periods and in like manner as is provided in respect to bonds given on the exportation of goods, wares, and merchandise, entitled to drawback of duties: *Provided always*, That the said bounty or allowance shall not be paid until at least six months after the exportation of such pickled fish, to be computed from the date of the bond, and until the exporter or exporters thereof shall produce to the collector with whom such outward entry is made such certificates or other satisfactory proof of the landing of the same, as aforesaid, as is made necessary for cancelling the bonds given on the exportation of goods entitled to drawback: *And provided also*, That the bounty or allowance, as aforesaid, shall not be paid unless the same shall amount to ten dollars at least upon each entry.

SEC. 3. *And be it further enacted*, That no bounty, drawback, or allowance shall be made under the authority of this act, unless it shall be proved to the satisfaction of the collector that the pickled fish for which the bounty, drawback, or allowance shall be claimed was wholly cured with foreign salt, and on which a duty shall have been secured or paid.

SEC. 4. *And be it further enacted*, That if any pickled fish shall be falsely or fraudulently entered with intent to obtain the bounty or allowance on their exportation as here provided, when the said fish are not entitled to the same, the said fish or the value thereof, to be recovered of the person making such false entry, shall be forfeited.

SEC. 5. *And be it further enacted*, That from and after the last day of December, one thousand eight hundred and fourteen, there shall be paid on the last day of December, annually, to the owner of every vessel or his agent, by the collector of the district where such vessel may belong, that shall be qualified agreeably to law for carrying on the bank and other cod fisheries, and that shall actually have been employed therein at sea for the term of four months, at the least, of the fishing season next preceding, which season is accounted to be from the last day of February to the last day of November in every year, for each and every ton of such vessel's burden according to her admeasurement as licensed or enrolled, if of twenty tons and not exceeding thirty tons, two dollars and forty cents; and if above thirty tons, four dollars; of which allowance aforesaid three eighths

parts shall accrue and belong to the owner of such fishing vessel, and the other five eighths thereof shall be divided by him, his agent, or lawful representative to and among the several fishermen who shall have been employed in such vessel during the season aforesaid, or a part thereof, as the case may be, in such proportions as the fish they shall respectively have taken may bear to the whole quantity of fish taken on board such vessel during such season: *Provided*, That the allowance aforesaid on any one vessel for one season shall not exceed two hundred and seventy-two dollars.

SEC. 6. *And be it further enacted*, That from and after the last day of December, one thousand eight hundred and fourteen, there shall also be paid on the last day of December, annually, to the owner of every fishing boat or vessel of more than five tons and less than twenty tons, or to his agent or lawful representative, by the collector of the district where such boat or vessel may belong, the sum of one dollar and sixty cents upon every ton admeasurement of such boat or vessel, which allowance shall be accounted for as part of the proceeds of the fares of said boat or vessel, and shall accordingly be so divided among all persons interested therein: *Provided however*, That this allowance shall be made only to such boats or vessels as shall have been actually employed at sea in the cod fishery for the term of four months at the least of the preceding season: *And provided also*, That such boat or vessel shall have landed in the course of said preceding season a quantity of fish not less than twelve quintals for every ton of her admeasurement; the said quantity of fish to be ascertained when dried and cured fit for exportation, and according to the weight thereof as the same shall weigh at the time of delivery when actually sold, which account of the weight, with the original adjustment and settlement of the fare or fares among the owners and fishermen, together with a written account of the length, breadth, and depth of said boat or vessel, and the time she has actually been employed in the fishery in the preceding season, shall in all cases be produced and sworn or affirmed to before the said collector of the district, in order to entitle the owner, his agent, or lawful representative to receive the allowances aforesaid. And if at any time within one year after payment of such allowance it shall appear that any fraud or deceit has been practised in obtaining the same, the boat or vessel upon which such allowance shall have been paid, if found within the district aforesaid, shall be forfeited, otherwise the owner or owners having practised such fraud or deceit shall forfeit and pay one hundred dollars, to be sued for, recovered, and distributed in the same manner as forfeitures and penalties are to be sued for, recovered, and distributed for any breach of the act, intituled "An act to regulate the collection of duties on imports and tonnage."

SEC. 7. *And be it further enacted*, That the owner or owners of every fishing vessel of twenty tons and upwards, his or their agent or lawful representative, shall previous to receiving the allowance made by this act, produce to the collector who is authorized to pay the same the original agreement or agreements which may have been made with the fishermen employed on board such vessel, as is hereinbefore required, and also a certificate, to be by him or them subscribed, therein mentioning the particular days on which such vessel sailed and returned on the several voyages or fares she may have made in the preceding fishing season, to the truth of which he or they shall swear or affirm before the collector aforesaid.

SEC. 8. *And be it further enacted*, That no ship or vessel of twenty tons or upwards, employed as aforesaid, shall be entitled to the allowance granted by this act, unless the skipper or master thereof shall, before he proceeds on any fishing voyage, make an agreement in writing or in print with every fisherman employed therein, according to the provisions of the act intituled "An act for the government of persons in certain fisheries."

SEC. 9. *And be it further enacted*, That any person who shall make any false declaration in any oath or affirmation required by this act, being duly convicted thereof in any court of the United States having jurisdiction of such offence, shall be deemed guilty of wilful and corrupt perjury, and shall be punished accordingly.

SEC. 10. *And be it further enacted*, That this act shall continue in force until the termination of the war in which the United States are now engaged with the United Kingdom of Great Britian and Ireland, and the dependencies thereof, and for one year thereafter and no longer.

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ACT OF 1816, CHAPTER 14 (3 U. S. Stats. at Large, 254).

*An Act to continue in force "An Act entitled An Act, laying a Duty on imported Salt, granting a Bounty on Pickled Fish exported, and Allowances to certain Vessels employed in the Fisheries."*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the act, entitled "An act laying a duty on imported salt, granting a bounty on pickled fish exported, and allowances to certain vessels employed in the fisheries," passed on the twenty-ninth day of July, in the year one thousand eight hundred and thirteen, shall be, and the same is hereby continued in force, anything in the said act to the contrary thereof in any wise notwithstanding.

## ACT OF 1817, CHAPTER 31 (3 U. S. Stats. at Large, 351).

*An Act concerning the Navigation of the United States.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That after the thirtieth day of September next, no goods, wares, or merchandise shall be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country, of which the goods are the growth, production, or manufacture ; or from which such goods, wares, or merchandise can only be, or most usually are, first shipped for transportation : *Provided nevertheless,* That this regulation shall not extend to the vessels of any foreign nation which has not adopted, and which shall not adopt, a similar regulation.

SEC. 2. *And be it further enacted,* That all goods, wares, or merchandise imported into the United States contrary to the true intent and meaning of this act, and the ship or vessel wherein the same shall be imported, together with her cargo, tackle, apparel, and furniture, shall be forfeited to the United States ; and such goods, wares, or merchandise, ship, or vessel, and cargo, shall be liable to be seized, prosecuted, and condemned, in like manner, and under the same regulations, restrictions, and provisions, as have been heretofore established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws.

SEC. 3. *And be it further enacted,* That after the thirtieth day of September next, the bounties and allowances now granted by law to the owners of boats or vessels engaged in the fisheries shall be paid only on boats or vessels, the officers and at least three fourths of the crews of which shall be proved to the satisfaction of the collector of the district where such boat or vessel shall belong to be citizens of the United States, or persons not the subjects of any foreign prince or State.

SEC. 4. *And be it further enacted,* That no goods, wares, or merchandise shall be imported, under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power ; but this clause shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States, provided no goods, wares, or merchandise, other than those imported in such vessel from some foreign port, and which shall not have been unladen, shall be carried from one port or place to another in the United States.

SEC. 5. *And be it further enacted,* That after the thirtieth day of Sep-

tember next, there shall be paid a duty of fifty cents per ton upon every ship or vessel of the United States which shall be entered in a district in one State from a district in another State, except it be an adjoining State on the sea-coast, or on a navigable river or lake, and except also it be a coasting vessel going from Long Island, in the State of New York, to the State of Rhode Island, or from the State of Rhode Island to the said Long Island, having on board goods, wares, and merchandise, taken in one State, to be delivered in another State: *Provided*, That it shall not be paid on any ship or vessel having a license to trade between the different districts of the United States, or to carry on the bank or whale fisheries, more than once a year: *And provided also*, That if the owner of any such vessel, or his agent, shall prove, to the satisfaction of the collector, that three fourths at least of the crew thereof are American citizens, or persons not the subjects of any foreign prince or State, the duty to be paid in such case shall be only at the rate of six cents per ton; but nothing in this section shall be construed to repeal or effect any exemption from tonnage duty given by the eighth section of the act, entitled "An act to provide for the establishment of certain districts, and therein to amend an act, entitled An act to regulate the collection of duties on imports and tonnage, and for other purposes."

SEC. 6. *And be it further enacted*, That after the thirtieth day of September next, there shall be paid upon every ship or vessel of the United States, which shall be entered in the United States, from any foreign port or place, unless the officers, and at least two thirds of the crew thereof, shall be proved citizens of the United States, or persons not the subjects of any foreign prince or State, to the satisfaction of the collector, fifty cents per ton: *And provided also*, That this section shall not extend to ships or vessels of the United States which are now on foreign voyages, or which may depart from the United States prior to the first day of May next, until after their return to some port of the United States.

SEC. 7. *And be it further enacted*, That the several bounties and remissions, or abatements of duty, allowed by this act, in the case of vessels having a certain proportion of seamen who are American citizens, or persons not the subjects of any foreign power, shall be allowed only in the case of vessels having such proportion of American seamen during their whole voyage, unless in case of sickness, death, or desertion, or where the whole or part of the crew shall have been taken prisoners in the voyage.

## ACT OF 1817, CHAPTER 40 (3 U. S. Stats. at Large, 362).

*An Act authorizing the Deposit of the Papers of foreign Vessels, with the Consul of their respective Nations.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That the register, or other document in lieu thereof, together with the clearance and other papers, granted by the officers of the customs to any foreign ship or vessel, at her departure from the port or place from which she may have arrived, shall, previous to entry in any port of the United States, be produced to the collector with whom such entry is to be made. And it shall be the duty of the master or commander, within forty-eight hours after such entry, to deposit the said papers with the consul or vice-consul of the nation to which the vessel belongs, and to deliver to the collector the certificate of such consul or vice-consul that the said papers have been so deposited; and any master, or commander, as aforesaid, who shall fail to comply with this regulation, shall, upon conviction thereof in any court of competent jurisdiction, be fined in a sum not less than five hundred dollars, nor exceeding two thousand dollars: *Provided,* That this act shall not extend to the vessels of foreign nations in whose ports American consuls are not permitted to have the custody and possession of the register and other papers of vessels entering the ports of such nation, according to the provisions of the second section of the act supplementary to the act "concerning consuls and vice-consuls, and for the further protection of American seamen," passed the twenty-eighth of February, one thousand eight hundred and three.

SEC. 2. *And be it further enacted,* That it shall not be lawful for any foreign consul to deliver to the master or commander of any foreign vessel the register and other papers deposited with him pursuant to the provisions of this act, until such master or commander shall produce to him a clearance in due form from the collector of the port where such vessel has been entered; and any consul offending against the provisions of this act shall, upon conviction thereof before the Supreme Court of the United States, be fined at the discretion of the court in a sum not less than five hundred dollars, nor exceeding five thousand dollars.

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ACT OF 1819, CHAPTER 48 (3 U. S. Stats. at Large, 492).

*An Act supplementary to the Acts concerning the Coasting Trade.*<sup>1</sup>

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That for the more

<sup>1</sup> See Act of 1820, c. 122 · Act of 1822, c. 56; Act of 1823, c. 22.

convenient regulation of the coasting trade, the sea-coast and navigable rivers of the United States be, and hereby are, divided into two great districts; the first, to include all the districts on the sea-coast and navigable rivers, between the eastern limits of the United States and the southern limits of Georgia, and the second, to include all the districts on the sea-coast and navigable rivers, between the river Perdido and the western limits of the United States.

SEC. 2. *And be it further enacted*, That every ship or vessel, of the burden of twenty tons or upwards, licensed to trade between the different districts of the United States, shall be, and is hereby authorized to carry on such trade between the districts included within the aforesaid great districts respectively, and between a State in one, and an adjoining State in another, great district, in manner, and subject only to the regulations that are, now by law required to be observed by such ships or vessels, in trading from one district to another in the same State, or from a district in one State to a district in the next adjoining State, anything in any law to the contrary, notwithstanding.

SEC. 3. *And be it further enacted*, That every ship or vessel, of the burden of twenty tons or upwards, licensed to trade as aforesaid, shall be, and is hereby, required, in trading from one to another great district, other than between a State in one, and an adjoining State in another, great district, to conform to and observe the regulations, that, at the time of passing this act, are required to be observed by such vessels in trading from a district in one State to a district in any other than an adjoining State.

SEC. 4. *And be it further enacted*, That the trade between the districts not included in either of the two great districts aforesaid shall continue to be carried on in the manner, and subject to the regulations, already provided for this purpose.

SEC. 5. *And be it further enacted*, That this act shall commence and be in force, from and after the thirtieth day of June next after the passing thereof.

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ACT OF 1819, CHAPTER 77 (3 U. S. Stats. at Large, 510).

*An Act to protect the Commerce of the United States, and punish the Crime of Piracy.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the President of the United States be, and hereby is, authorized and requested to employ so many of the public armed vessels as, in his judgment, the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations.

SEC. 2. *And be it further enacted*, That the President of the United States be, and hereby is, authorized to instruct the commanders of the public armed vessels of the United States to subdue, seize, take, and send into any port of the United States, any armed vessel or boat, or any vessel or boat, the crew whereof shall be armed, and which shall have attempted or committed any piratical aggression, search, restraint, depredation, or seizure, upon any vessel of the United States, or of the citizens thereof, or upon any other vessel; and also to retake any vessel of the United States, or its citizens, which may have been unlawfully captured upon the high seas.

SEC. 3. *And be it further enacted*, That the commander and crew of any merchant vessel of the United States, owned wholly, or in part, by a citizen thereof, may oppose and defend against any aggression, search, restraint, depredation, or seizure, which shall be attempted upon such vessel, or upon any other vessel owned as aforesaid by the commander or crew of any armed vessel whatsoever, not being a public armed vessel of some nation in amity with the United States; and may subdue and capture the same; and may also retake any vessel, owned as aforesaid, which may have been captured by the commander or crew of any such armed vessel, and send the same into any port of the United States.

SEC. 4. *And be it further enacted*, That whenever any vessel or boat, from which any piratical aggression, search, restraint, depredation, or seizure shall have been first attempted or made, shall be captured and brought into any port of the United States, the same shall and may be adjudged and condemned to their use, and that of the captors, after due process and trial, in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and at their discretion.

SEC. 5. *And be it further enacted*, That if any person or persons whatsoever, shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders, shall afterwards be brought into or found in the United States, every such offender or offenders shall, upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death.

SEC. 6. *And be it further enacted*, That this act shall be in force until the end of the next session of Congress.



## ACT OF 1819, CHAPTER 89 (3 U. S. Stats. at Large, 520).

*An Act in addition to, and alteration of an Act, entitled "An Act laying a Duty on imported Salt, granting a Bounty on Pickled Fish exported, and Allowances to certain Vessels employed in the Fisheries."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That from and after the passing of this act, there shall be paid, on the last day of December, annually, to the owner of every fishing boat or vessel, or his agent, by the collector of the district where such boat or vessel may belong, that shall be qualified, agreeably to law, for carrying on the bank and other cod fisheries, and that shall actually have been employed therein, at sea, for the term of four months at least, of the fishing season next preceding, which season is accounted to be from the last day of February to the last day of November in every year, for each and every ton of such boats or vessels, burden according to her admeasurement as licensed or enrolled, if of more than five tons, and not exceeding thirty tons, three dollars and fifty cents; if above thirty tons, four dollars; and if above thirty tons, and having had a crew of not less than ten persons, and having been actually employed in the cod fishery, at sea, for the term of three and one half months, at the least, but less than four months, of the season aforesaid, three dollars and fifty cents: *Provided,* That the allowance aforesaid, on any one vessel, for one season, shall not exceed three hundred and sixty dollars.

SEC. 2. *And be it further enacted,* That such parts of the fifth and sixth sections of the act hereby amended as are contrary to the provisions of this act be, and the same are hereby, repealed.

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ACT OF 1820, CHAPTER 113 (3 U. S. Stats. at Large, 600).

*An Act to continue in force "An Act to protect the Commerce of the United States, and punish the Crime of Piracy," and also to make further Provisions for punishing the Crime of Piracy.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the first, second, third, and fourth sections of an act, entitled "An act to protect the commerce of the United States and punish the crime of piracy," passed on the third day of March, one thousand eight hundred and nineteen, be, and the same are hereby, continued in force, from the passing of this act for the term of two years, and from thence to the end of the next session of Congress, and no longer.

SEC. 2. *And be it further enacted,* That the fifth section of the said act

be, and the same is hereby, continued in force, as to all crimes made punishable by the same, and heretofore committed, in all respects as fully as if the duration of the said section had been without limitation.

SEC. 3. *And be it further enacted*, That, if any person shall, upon the high seas, or in any open roadstead, or in any haven, basin, or bay, or in any river where the sea ebbs and flows, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof, such person shall be adjudged to be a pirate: and, being thereof convicted before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death. And if any person engaged in any piratical cruise or enterprise, or, being of the crew or ship's company of any piratical ship or vessel, shall land from such ship or vessel, and, on shore, shall commit robbery, such person shall be adjudged a pirate: and on conviction thereof before the circuit court of the United States for the district into which he shall be brought, or in which he shall be found, shall suffer death: *Provided*, That nothing in this section contained shall be construed to deprive any particular State of its jurisdiction over such offences, when committed within the body of a county, or authorize the courts of the United States to try any such offenders, after conviction or acquittance, for the same offence, in a state court.

SEC. 4. *And be it further enacted*, That if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave-trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned in the whole or part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall land, from any such ship or vessel, and, on any foreign shore, seize any negro or mulatto, not held to service or labor by the laws of either of the States or territories of the United States, with intent to make such negro or mulatto a slave, or shall decoy, or forcibly bring or carry, or shall receive, such negro or mulatto on board any such ship or vessel, with intent as aforesaid, such citizen or person shall be adjudged a pirate; and, on conviction thereof before the circuit court of the United States for the district wherein he may be brought or found, shall suffer death.

SEC. 5. *And be it further enacted*, That if any citizen of the United States, being of the crew or ship's company of any foreign ship or vessel engaged in the slave-trade, or any person whatever, being of the crew or ship's company of any ship or vessel, owned wholly or in part, or navigated for, or in behalf of, any citizen or citizens of the United States, shall forcibly confine or detain, or aid and abet in forcibly confining or detaining, on board such ship or vessel, any negro or mulatto not held to service by the laws of either of the States or territories of the United States, with

intent to make such negro or mulatto a slave, or shall, on board any such ship or vessel, offer or attempt to sell, as a slave, any negro or mulatto not held to service as aforesaid, or shall, on the high seas, or anywhere on tide water, transfer or deliver over, to any other ship or vessel, any negro or mulatto, not held to service as aforesaid, with intent to make such negro or mulatto a slave, or shall land, or deliver on shore, from on board any such ship or vessel, any such negro or mulatto, with intent to make sale of, or having previously sold, such negro or mulatto, as a slave, such citizen or person shall be adjudged a pirate; and, on conviction thereof before the circuit court of the United States for the district wherein he shall be brought or found, shall suffer death.

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ACT OF 1821, CHAPTER 14 (3 U. S. Stats. at Large, 616).

*An Act further to regulate the entry of Merchandise imported into the United States from any adjacent Territory.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be the duty of the master of any vessel, except registered vessels, and of every person having charge of any boat, canoe, or raft, and of the conductor or driver of any carriage or sleigh, and of every other person, coming from any foreign territory adjacent to the United States, into the United States, with merchandise subject to duty, to deliver, immediately on his or her arrival within the United States, a manifest of the cargo or loading of such vessel, boat, canoe, raft, carriage, or sleigh, or of the merchandise so brought from such foreign territory, at the office of any collector or deputy collector which shall be nearest to the boundary line, or nearest to the road or waters by which such merchandise is brought; and every such manifest shall be verified by the oath of such person delivering the same; which oath shall be taken before such collector or deputy collector; and such oath shall state that such manifest contains a full, just, and true account, of the kinds, quantities, and values, of all the merchandise, so brought from such foreign territory; and if the master, or other person having charge of such vessel, boat, canoe, or raft, or the conductor or driver of such carriage or sleigh, or other person, bringing merchandise as aforesaid, shall neglect or refuse to deliver the manifest herein required, or pass by, or avoid, such office, the merchandise subject to duty, and so imported, shall be forfeited to the United States, together with the vessel, boat, canoe, or raft, the tackle, apparel, and furniture of the same, or the carriage or sleigh, and harness and cattle, drawing the same, or the horses with their saddles and

bridles, as the case may be; and such master, conductor, or other importer shall be subject to pay a penalty of four hundred dollars.

SEC. 2. *And be it further enacted*, That any deputy collector stationed in any district of the customs contiguous to a foreign territory, to whom a manifest of merchandise, subject to duty, shall be delivered as aforesaid, is hereby authorized to require of the importer of such merchandise the payment of the duties thereon, or good and ample security, either by bond, with one or more sufficient sureties, for the payment thereof, or by the deposit of a portion of such merchandise, equal, at least, to double the amount of the duties on the whole importation; which bond shall be cancelled, or the merchandise, so deposited, shall be delivered to the owner, on the producing to the deputy collector a certificate, of the collector of the district, that the duties have been duly paid.

SEC. 3. *And be it further [enacted,]* That all penalties and forfeitures incurred by force of this act shall be sued for, recovered, distributed, and accounted for in the manner prescribed by the act, entitled, "An act to regulate the collection of duties on imports and tonnage," passed on the second day of March, one thousand seven hundred and ninety-nine, and may be mitigated or remitted in the manner prescribed by the act, entitled "An act to provide for the mitigating or remitting the forfeitures penalties, and disabilities, accruing in certain cases therein mentioned," passed on the third day of March, one thousand seven hundred and ninety-seven.

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ACT OF 1823, CHAPTER 7 (3 U. S. Stats. at Large, 721).

*An Act in addition to "An Act to continue in force 'An Act to protect the Commerce of the United States, and punish the Crime of Piracy,' and, also, to make further Provision for punishing the Crime of Piracy."*

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled*, That the first, second, third, and fourth sections of an act, entitled "An act to protect the commerce of the United States, and punish the crime of piracy," passed on the third day of March, in the year of our Lord one thousand eight hundred and nineteen, be, and the same are hereby, continued in force, in all respects, as fully as if the said sections had been enacted without limitation, in the said act, or in the act to which this is an addition, and which was passed on the fifteenth day of May, in the year of our Lord one thousand eight hundred and twenty.

## ACT OF 1823, CHAPTER 58 (3 U. S. Stats. at Large, 781).

*An Act to amend an Act, entitled "And [An] Act further to regulate the entry of Merchandise imported into the United States from any adjacent Territory."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That from and after the passage of this act, every master or other person having charge of a vessel, boat, canoe, or raft, or the conductor or driver of any carriage, or sleigh, or other person bringing merchandise, from any foreign territory adjacent to the United States, who shall neglect or refuse to deliver a manifest, as is required in and by the act, entitled "An act further to regulate the entry of merchandise imported into the United States from any adjacent territory," passed the second day of March, one thousand eight hundred and twenty-one, shall be subject to pay, instead of the penalty of four hundred dollars imposed by the first section of said act, four times the value of the merchandise so imported.

SEC. 2. *And be it further enacted,* That if any person or persons shall receive, conceal, or buy, any goods, wares, or merchandise, knowing them to have been illegally imported into the United States, and liable to seizure by virtue of any act in relation to the revenue, such person or persons shall, on conviction thereof, forfeit and pay a sum double the amount or value of the goods, wares, or merchandise, so received, concealed, or purchased.

SEC. 3. *And be it further enacted,* That if any person shall forcibly resist, prevent, or impede, any officer of the customs or their deputies, or any other person assisting them in the execution of their duty, such person, so offending, shall, for every such offence, be fined a sum not exceeding four hundred dollars.

SEC. 4. *And be it further enacted,* That the provisions of the forty-sixth section of the act, entitled "An act to regulate the collection of duties on imports and tonnage," passed the second day of March, Anno Domini one thousand seven hundred and ninety-nine, be, and they are hereby, extended to the case of goods, wares, merchandise, imported into the United States from an adjacent territory.

SEC. 5. *And be it further enacted,* That all penalties and forfeitures, incurred by force of this act, shall be sued for, recovered, distributed, and accounted for, in the manner prescribed by an act, entitled "An act to regulate the collection of duties on imports and tonnage," passed on the second day of March, Anno Domini one thousand seven hundred and ninety-nine.

## ACT OF 1825, CHAPTER 65 (4 U. S. Stats. at Large, 115).

*An Act more effectually for the Punishment of certain Crimes against the United States, and for other Purposes.*

SECTION 4. *And be it further enacted*, That if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, shall commit the crime of wilful murder, or rape, or shall, wilfully and maliciously, strike, stab, wound, poison, or shoot at, any other person, of which striking, stabbing, wounding, poisoning, or shooting such person shall afterwards die, upon land, within or without the United States, every person so offending, his or her counsellors, aiders, or abettors, shall be deemed guilty of felony, and shall, upon conviction thereof, suffer death.

SEC. 5. *And be it further enacted*, That if any offence shall be committed on board of any ship or vessel, belonging to any citizen or citizens of the United States, while lying in a port or place within the jurisdiction of any foreign State or sovereign, by any person belonging to the company of said ship, or any passenger, or any other person belonging to the company of said ship, on any other passenger, the same offence shall be cognizable and punishable by the proper circuit court of the United States, in the same way and manner, and under the same circumstances, as if said offence had been committed on board of such ship or vessel on the high seas, and without the jurisdiction of such foreign sovereign or State: *Provided, always*, That if such offender shall be tried for such offence, and acquitted or convicted thereof, in any competent court of such foreign State or sovereign, he shall not be subject to another trial in any court of the United States.

SEC. 6. *And be it further enacted*, That, if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State, shall, by surprise or by open force or violence, maliciously attack, or set upon, any ship or vessel belonging in whole or part, to the United States, or to any citizen or citizens thereof, or to any other person whatsoever, with an intent unlawfully to plunder the same ship or vessel, or to despoil any owner or owners thereof, of any moneys, goods, or merchandise, laden on board thereof, every person so offending, his or her counsellors, aiders, or abettors, shall be deemed guilty of felony; and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and by imprisonment and

confinement to hard labor, not exceeding ten years, according to the aggravation of the offence.

SEC. 7. *And be it further enacted*, That, if any person or persons, upon the high seas, or in any other of the places aforesaid, with intent to kill, rob, steal, commit a rape, or to do or perpetrate any other felony, shall break or enter any ship or vessel, boat or raft; or if any person or persons shall, wilfully and maliciously, cut, spoil, or destroy, any cordage, cable, buoys, buoy-rope, headfast, or other fast, fixed to any anchor or moorings, belonging to any ship, vessel, boat, or raft; every person, so offending, his or her counsellors, aiders, and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, and by imprisonment and confinement to hard labor, not exceeding five years, according to the aggravation of the offence.

SEC. 8. *And be it further enacted*, That, if any person or persons, upon the high seas, or in any of the places aforesaid, shall buy, receive, or conceal, or aid in concealing any money, goods, bank-notes, or other effects or things which may be the subject of larceny, which have been feloniously taken or stolen, from any other person, knowing the same to have been taken or stolen, every person, so offending, shall be deemed guilty of a misdemeanor, and may be prosecuted therefor, although the principal offender chargeable, or charged with the larceny, shall not have been prosecuted or convicted thereof; and shall on conviction thereof, be punished by fine, not exceeding one thousand dollars, and imprisonment and confinement to hard labor, not exceeding three years, according to the aggravation of the offence.

SEC. 9. *And be it further enacted*, That, if any person or persons shall plunder, steal, or destroy, any money, goods, merchandise, or other effects, from or belonging to any ship or vessel, or boat or raft, which shall be in distress, or which shall be wrecked, lost, stranded, or cast away, upon the sea, or upon any reef, shoal, bank, or rocks, of the sea, or in any other place within the admiralty and maritime jurisdiction of the United States, or if any person or persons shall wilfully obstruct the escape of any person endeavoring to save his or her life from such ship, or vessel, boat, or raft, or the wreck thereof, or, if any person or persons shall hold out or show any false light, or lights, or extinguish any true light, with intention to bring any ship or vessel, boat or raft, being or sailing upon the sea, into danger, or distress, or shipwreck; every person, so offending, his or her counsellors, aiders, and abettors, shall be deemed guilty of felony, and shall, on conviction thereof, be punished by fine, not exceeding five thousand dollars, and imprisonment and confinement to hard labor, not exceeding ten years, according to the aggravation of the offence.

SEC. 10. *And be it further enacted*, That, if any master or commander

of any ship or vessel, belonging, in whole, or in part, to any citizen or citizens of the United States, shall, during his being abroad, maliciously, and without justifiable cause, force any officer, or mariner of such ship or vessel, on shore, or leave him behind, in any foreign port or place, or refuse to bring home again, all such of the officers and mariners of such ship or vessel, whom he carried out with him, as are in a condition to return, and willing to return, when he shall be ready to proceed in his homeward voyage, every master or commander, so offending, shall, on conviction thereof, be punished by fine, not exceeding five hundred dollars, or by imprisonment, not exceeding six months, according to the aggravation of the offence.

SEC. 11. *And be it further enacted*, That, if any person or persons shall, wilfully and maliciously, set on fire, or burn, or otherwise destroy or cause to be set on fire, or burnt, or otherwise destroyed, or aid, procure, abet, or assist in setting on fire, or burning, or otherwise destroying, any ship or vessel of war of the United States, afloat on the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, every person so offending shall be deemed guilty of felony, and shall, on conviction thereof, suffer death: *Provided*, That nothing herein contained shall be construed to take away or impair the right of any court martial to punish any offence, which, by the law of the United States, may be punishable by such court.

SEC. 22. *And be it further enacted*, That, if any person or persons, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or in part to the United States, or any citizen or citizens thereof, shall, with a dangerous weapon, or with intent to kill, rob, steal, or to commit a mayhem, or rape, or to perpetrate any other felony, commit an assault on another, such person shall, on conviction thereof, be punished by fine, not exceeding three thousand dollars, and by imprisonment and confinement to hard labor, not exceeding three years, according to the aggravation of the offence.

SEC. 23. *And be it further enacted*, That, if any person or persons shall, on the high seas, or within the United States, wilfully and corruptly conspire, combine, and confederate, with any other person or persons, such other person or persons being either within or without the United States, to cast away, burn, or otherwise destroy, any ship or vessel, or to procure the same to be done, with intent to injure any person, or body politic, that hath underwritten, or shall thereafterwards underwrite, any policy of insurance thereon, or on goods on board thereof, or with intent to injure any person, or body politic, that hath lent or advanced, or thereafter shall lend



or advance, any money on such vessel, on bottomry or respondentia, or shall, within the United States, build or fit out, or aid in building or fitting out, any ship or vessel, with intent that the same shall be cast away, burnt, or destroyed, for the purpose or with the design aforesaid, every person, so offending, shall, on conviction thereof, be deemed guilty of felony, and shall be punished by fine, not exceeding ten thousand dollars, and by imprisonment, and confinement to hard labor, not exceeding ten years.

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ACT OF 1825, CHAPTER 99 (4 U. S. Stats. at Large, 129).

*An Act to authorize the Register or Enrolment and License to be issued in the Name of the President or Secretary of any incorporated Company owning a Steamboat or Vessel.*<sup>1</sup>

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That enrolments and licenses for steamboats or vessels, owned by any incorporated company, may be issued in the name of the president or secretary of such company; and that such enrolments and licenses shall not be vacated or affected by a sale of any share or shares of any stockholder, or stockholders, in such company.

SEC. 2. *And be it further enacted*, That registers for steamboats or vessels, owned by any incorporated company, may be issued in the name of the president or secretary of such company; and that such register shall not be vacated or affected by a sale of any share or shares of any stockholder or stockholders in such company.

SEC. 3. *And be it further enacted*, That, upon the death, removal, or resignation of the president or secretary of any incorporated company, owning any steamboat or vessel, a new register, or enrolment and license, as the case may be, shall be taken out for such steamboat or vessel.

SEC. 4. *And be it further enacted*, That, previously to granting a register, or enrolment and license, for any steamboat or vessel, owned by any company, the president or secretary of such company shall swear, or affirm, as to the ownership of such steamboat or vessel, by such company, without designating the names of the persons composing such company; which oath, or affirmation, shall be deemed sufficient, without requiring the oath or affirmation of any other person interested or concerned in such steamboat or vessel.

SEC. 5. *And be it further enacted*, That, before granting a register for any steamboat or vessel, so owned by any incorporated company, the president or secretary thereof shall swear, or affirm, that, to the best of his

<sup>1</sup> See Act of 1831, c. 115.

knowledge and belief, no part of such steamboat or vessel has been, or is then, owned by any foreigner or foreigners.<sup>1</sup>

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ACT OF 1825, CHAPTER 107 (4 U. S. Stats. at Large, 132).

*An Act concerning Wrecks on the Coast of Florida.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled,* That, if any ship or vessel shall, after the passing of this act, be engaged or employed in carrying or transporting any property whatsoever, taken from any wreck, from the sea, or from any of the keys or shoals within the jurisdiction of the United States, on the coast of Florida, to any foreign port or place, every such ship or vessel, so engaged and employed, together with her tackle, apparel, and furniture, shall be wholly forfeited, and may be seized and condemned in any court of the United States, or territories thereof, having competent jurisdiction.

SEC. 2. *And be it further enacted,* That all property, of every description whatsoever, which shall be taken from any wreck from the sea, or from any of the keys and shoals, within the jurisdiction of the United States, on the coast of Florida, shall be brought to some port of entry within the jurisdiction aforesaid.

SEC. 3. *And be it further enacted,* That all and every forfeiture, or forfeitures, which shall be incurred by virtue of the provisions of this act, shall accrue one moiety to the informer, or informers, and the other to the United States, and may be mitigated, or remitted, in manner prescribed by the act, entitled "An act to provide for mitigating or remitting the forfeitures, penalties, and disabilities accruing in certain cases therein mentioned," passed the third day of March, one thousand seven hundred and ninety-seven, and made perpetual by an act passed eleventh February, one thousand eight hundred.

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ACT OF 1828, CHAPTER 119 (4 U. S. Stats. at Large, 312).

*An Act to authorize the licensing of Vessels to be employed in the Mackerel Fishery.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, from and after the passage of this act, it shall be the duty of the collector of the district to which any vessel may belong, on an application for that purpose by the master or

<sup>1</sup> Section 5 is repealed by Act of 1858, c. 145.

owner thereof, to issue a license for carrying on the mackerel fishery, to such vessel, in the form prescribed by the act, entitled "An Act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," passed the eighteenth day of February, one thousand seven hundred and ninety-three: *Provided*, That all the provisions of said act, respecting the licensing of ships or vessels for the coasting trade and fisheries, shall be deemed and taken to be applicable to licenses and to vessels licensed for carrying on the mackerel fishery.

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ACT OF 1829, CHAPTER 41 (4 U. S. Stats. at Large, 359).

*An Act to provide for the Apprehension and Delivery of Deserters from certain foreign Vessels in the Ports of the United States.*<sup>1</sup>

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That on application of a consul or vice-consul of any foreign government, having a treaty with the United States, stipulating for the restoration of seamen deserting, made in writing, stating that the person therein named has deserted from a vessel of any such government while in any port of the United States, and on proof by the exhibition of the register of the vessel, ship's roll, or other official document, that the person named belonged, at the time of desertion, to the crew of said vessel, it shall be the duty of any court, judge, justice, or other magistrate, having competent power, to issue warrants to cause the said person to be arrested for examination; and if, on examination, the facts stated are found to be true, the person arrested, not being a citizen of the United States, shall be delivered up to the said consul or vice-consul, to be sent back to the dominions of any such government, or, on the request, and at the expense, of the said consul or vice-consul, shall be detained until the consul or vice-consul finds an opportunity to send him back to the dominions of any such government: *Provided nevertheless*, That no person shall be detained more than two months after his arrest; but at the end of that time shall be set at liberty, and shall not be again molested for the same cause; *And provided further*, That if any such deserter shall be found to have committed any crime or offence, his surrender may be delayed until the tribunal before which the case shall be depending, or may be cognizable, shall have pronounced its sentence, and such sentence shall have been carried into effect.

<sup>1</sup> See Act of 1855, c. 123.

## ACT OF 1830, CHAPTER 14 (4 U. S. Stats. at Large, 373).

*An Act to authorize Surveyors, under the Direction of the Secretary of the Treasury, to enroll and license Ships or Vessels to be employed in the Coasting Trade and Fisheries.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, after the passage of this act, the secretary of the treasury be, and he is hereby, invested with powers to authorize the surveyor of any port of delivery, under such regulations as he shall deem necessary, to enroll and license ships or vessels to be employed in the coasting trade and fisheries, in like manner as collectors of ports of entry are now authorized to do, under existing laws.

SEC. 2. *And be it further enacted,* That any surveyor who shall perform the duties directed to be performed by the first section of this act shall be entitled to receive the same commissions and fees as are now allowed by law to collectors for performing the same duties, and no more.

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## ACT OF 1831, CHAPTER 20 (4 U. S. Stats. at Large, 441).

*An Act to repeal the Charges imposed on Passports and Clearances.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, so much of the act of the first of June, one thousand seven hundred and ninety-six, entitled "An act providing passports for the ships and vessels of the United States," as imposes a charge of ten dollars for passports, and of four dollars for a clearance, to any ship or vessel bound on a voyage to any foreign country, be, and the same is hereby, repealed, to take effect from and after the thirty-first day of March of the present year.

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## ACT OF 1831, CHAPTER 98 (4 U. S. Stats. at Large, 487).

*An Act to regulate the Foreign and Coasting Trade on the Northern, Northeastern, and Northwestern Frontiers of the United States, and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, from and after the first day of April next, no custom-house fees shall be levied or collected on any raft, flat, boat, or vessel of the United States, entering otherwise than by sea at any port of the United States on the rivers and lakes on our northern, northeastern, and northwestern frontiers.

SEC. 2. *And be it further enacted,* That, from and after the first day of April next, the same and no higher tonnage duties and custom-house

charges of any kind shall be levied and collected on any British colonial raft, flat, boat, or vessel, entering otherwise than by sea at any port of the United States on the rivers and lakes on our northern, northeastern, and northwestern frontiers, than may be levied and collected on any raft, flat, boat, or vessel, entering otherwise than by sea at any of the ports of the British possessions on our northern, northeastern, and northwestern frontiers; and that, from and after the first day of April next, no higher discriminating duty shall be levied or collected on merchandise imported into the United States in the ports aforesaid, and otherwise than by sea, than may be levied and collected on merchandise when imported in like manner otherwise than by sea, into the British possessions on our northern, northeastern, and northwestern frontiers from the United States.

SEC. 3. *And be it further enacted*, That, from and after the passage of this act, any boat, sloop, or other vessel of the United States, navigating the waters on our northern, northeastern, and northwestern frontiers, otherwise than by sea, shall be enrolled and licensed in such form as may be prescribed by the secretary of the treasury; which enrolment and license shall authorize any such boat, sloop, or other vessel to be employed either in the coasting or foreign trade; and no certificate of registry shall be required for vessels so employed on said frontiers: *Provided*, That such boat, sloop, or vessel shall be in every other respect liable to the rules, regulations, and penalties now in force, relating to registered vessels on our northern, northeastern, and northwestern frontiers.

SEC. 4. *And be it further enacted*, That in lieu of the fees, emoluments, salary, and commissions now allowed by law to any collector or surveyor of any district on our northern, northeastern, and northwestern lakes and rivers, each collector or surveyor, as aforesaid, shall receive, annually, in full compensation for these services, an amount equal to the entire compensation received by such officer during the past year.

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ACT OF 1831, CHAPTER 115 (4 U. S. Stats. at Large, 492).

*An Act concerning Vessels employed in the Whale Fishery.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the provisions of the act, entitled "An act to authorize the register or enrolment, and license, to be issued in the name of the president or secretary of any incorporated company owning a steamboat or vessel," passed the third day of March, one thousand eight hundred and twenty-five, shall extend and be applicable to every ship or vessel owned by any incorporated company, and em-

ployed wholly in the whale fishery, so long as such ship or vessel shall be wholly employed in the whale fishery.

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ACT OF 1835, CHAPTER 40 (4 U. S. Stats. at Large, 775).

*An Act in Amendment of the Acts for the Punishment of Offences against the United States.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That if any one or more of the crew of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall unlawfully, wilfully, and with force, or by fraud, threats, or other intimidations, usurp the command of such ship or vessel from the master or other lawful commanding officer thereof, or deprive him of his authority and command on board thereof, or resist or prevent him in the free and lawful exercise thereof, or transfer such authority and command to any other person not lawfully entitled thereto, every such person so offending, his aiders or abettors, shall be deemed guilty of a revolt or mutiny and felony; and shall, on conviction thereof, be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years, according to the nature and aggravation of the offence. And the offence of making a revolt in a ship, which now is, under and in virtue of the eighth section of the act of Congress, passed the thirtieth day of April, in the year of our Lord one thousand seven hundred and ninety, punishable as a capital offence, shall, from and after the passage of the present act, be no longer punishable as a capital offence, but shall be punished in the manner prescribed in the present act, and not otherwise.

SEC. 2. *And be it further enacted,* That if any one or more of the crew of any American ship or vessel on the high seas, or any other waters, within the admiralty and maritime jurisdiction of the United States, shall endeavor to make a revolt or mutiny on board such ship or vessel, or shall combine, conspire, or confederate with any other person or persons on board to make such revolt or mutiny, or shall solicit, incite, or stir up any other or others of the crew to disobey or resist the lawful orders of the master, or other officer of such ship or vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust therein, or shall assemble with others in a tumultuous and mutinous manner, or make a riot on board thereof, or shall unlawfully confine the master, or other commanding officer thereof, every such person so offending shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.

SEC. 3. *And be it further enacted*, That if any master or other officer, of any American ship or vessel on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, shall from malice, hatred, or revenge, and without justifiable cause, beat, wound, or imprison any one or more of the crew of such ship or vessel, or withhold from them suitable food and nourishment, or inflict upon them any cruel and unusual punishment, every such person so offending shall, on conviction thereof, be punished by fine, not exceeding one thousand dollars, or by imprisonment not exceeding five years, or by both, according to the nature and aggravation of the offence.

SEC. 4. *And be it further enacted*, That whenever any person indicted for any offence against the United States, whether capital or otherwise, shall upon his arraignment stand mute, or will not plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party shall plead not guilty, or such plea shall be entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury. And in all trials in capital cases, if the party indicted shall peremptorily challenge above the number of jurors allowed by law, such excess of challenges shall be disallowed by the court, and the cause shall proceed for trial in the same manner as if the same [said] challenges had not been made.

SEC. 5. *And be it further enacted*, That whenever any person shall be convicted of any offence against the United States which is punishable by fine and imprisonment, or by either, it shall be lawful for the court by which the sentence is passed to order the sentence to be executed in any house of correction, or house of reformation for juvenile delinquents, within the State or district where such court is holden, the use of which shall be allowed and authorized by the legislature of the State for such purpose. And the expenses attendant upon the execution of such sentence shall be paid by the United States.

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ACT OF 1836, CHAPTER 55 (5 U. S. Stats. at Large, 16).

*An Act in addition to the Act of the twenty-fourth of May, one thousand eight hundred and twenty-eight, entitled "An Act to authorize the licensing of Vessels to be employed in the Mackerel Fishery."*<sup>1</sup>

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That vessels duly licensed under the provisions of "An act to authorize the licensing of vessels to be

<sup>1</sup> See Act of 1866, ch. 298, § 4.

employed in the mackerel fishery," passed May twenty-fourth, one thousand eight hundred and twenty-eight shall not be deemed or taken to be liable to the forfeitures imposed by the fifth and thirty-second sections of the act of Congress, approved the eighteenth day of February, one thousand seven hundred and ninety-three, entitled "An act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same," in consequence of any such vessel, whilst licensed as aforesaid, having been engaged in catching cod, or fish of any other description whatever: *Provided, however,* That this act shall not be deemed or considered as authorizing or entitling the owner or owners of any vessel licensed for the mackerel fishery, to receive the bounty allowed by law to vessels employed in the cod fishery.

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ACT OF 1837, CHAPTER 21 (5 U. S. Stats. at Large, 153).

*An Act to provide for the Enlistment of Boys for the Naval Service, and to extend the Term of the Enlistment of Seamen.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be lawful to enlist boys for the navy, with the consent of their parents or guardians, not being under thirteen, nor over eighteen years of age, to serve until they shall arrive at the age of twenty-one years; and it shall be lawful to enlist other persons for the navy, to serve for a period not exceeding five years, unless sooner discharged by direction of the President of the United States; and so much of an act entitled "An act to amend the act entitled 'An act to amend the act authorizing the employment of an additional naval force,'" approved fifteenth May, one thousand eight hundred and twenty, as is inconsistent with the provisions of this act, shall be, and is hereby, repealed.

SEC. 2. *And be it further enacted,* That when the time of service of any person enlisted for the navy shall expire, while he is on board any of the public vessels of the United States, employed on foreign service, it shall be the duty of the commanding officer of the fleet, squadron, or vessel, in which such person may be, to send him to the United States in some public or other vessel, unless his detention shall be essential to the public interests, in which case the said officer may detain him until the vessel in which he shall be serving shall return to the United States; and it shall be the duty of said officer, immediately to make report to the navy department, of such detention and the causes thereof.

SEC. 3. *And be it further enacted,* That such persons as may be detained after the expiration of their enlistment, under the next preceding section



of this act, shall be subject, in all respects, to the laws and regulations for the government of the navy, until their return to the United States ; and all such persons as shall be so detained, and all such as shall voluntarily re-enlist to serve until the return of the vessel in which they shall be serving, and their regular discharge therefrom in the United States, shall, while so detained and while so serving under their re-enlistment, receive an addition of one fourth to their former pay.

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ACT OF 1837, CHAPTER 22 (5 U. S. Stats. at Large, 153).

*An Act concerning Pilots.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall and may be lawful for the master or commander of any vessel coming into or going out of any port situate upon waters, which are the boundary between two States, to employ any pilot duly licensed or authorized by the laws of either of the States bounded on the said waters, to pilot said vessel to or from said port, any law, usage, or custom, to the contrary notwithstanding.

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ACT OF 1837, CHAPTER 1 (5 U. S. Stats. at Large, 208).

*An Act to authorize the President of the United States to cause the Public Vessels to cruise upon the Coast in the Winter Season and to relieve Distressed Navigators.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President of the United States be, and hereby is, authorized to cause any suitable number of public vessels, adapted to the purpose, to cruise upon the coast, in the severe portion of the season, when the public service will allow of it, and to afford such aid to distressed navigators as their circumstances and necessities may require ; and such public vessels shall go to sea prepared fully to render such assistance.

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ACT OF 1838, CHAPTER 191 (5 U. S. Stats. at Large, 304).

*An Act to provide for the better Security of the Lives of Passengers on board of Vessels propelled in whole or in part by Steam.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be the duty of all owners of steamboats, or vessels propelled in whole or in part by steam, on or before the first day of October, one thousand eight hundred and thirty-eight to make a new enrolment of the same, under the

existing laws of the United States, and take out from the collector or surveyor of the port, as the case may be, where such vessel is enrolled, a new license, under such conditions as are now imposed by law, and as shall be imposed by this act.

SEC. 2. *And be it further enacted*, That it shall not be lawful for the owner, master, or captain of any steamboat or vessel propelled in whole or in part by steam, to transport any goods, wares, and merchandise, or passengers, in or upon the bays, lakes, rivers, or other navigable waters of the United States, from and after the said first day of October, one thousand eight hundred and thirty-eight; without having first obtained, from the proper officer, a license under the existing laws, and without having complied with the conditions imposed by this act; and for each and every violation of this section, the owner or owners of said vessel shall forfeit and pay to the United States the sum of five hundred dollars, one half for the use of the informer; and for which sum or sums the steamboat or vessel so engaged shall be liable, and may be seized and proceeded against summarily, by way of libel, in any district court of the United States having jurisdiction of the offence.

SEC. 3. *And be it further enacted*, That it shall be the duty of the district judge of the United States, within whose district any ports of entry or delivery may be, on the navigable waters, bays, lakes, and rivers of the United States, upon the application of the master or owner of any steamboat or vessel propelled in whole or in part by steam, to appoint, from time to time, one or more persons skilled and competent to make inspections of such boats and vessels, and of the boilers and machinery employed in the same, who shall not be interested in the manufacture of steam engines, steamboat boilers, or other machinery belonging to steam vessels, whose duty it shall be to make such inspection when called upon for that purpose, and to give to the owner or master of such boat or vessel duplicate certificates of such inspection; such persons, before entering upon the duties enjoined by this act, shall make and subscribe an oath or affirmation before said district judge, or other officer duly authorized to administer oaths, well, faithfully, and impartially to execute and perform the services herein required of them.

SEC. 4. *And be it further enacted*, That the person or persons who shall be called upon to inspect the hull of any steamboat or vessel, under the provisions of this act, shall, after a thorough examination of the same, give to the owner or master, as the case may be, a certificate, in which shall be stated the age of the said boat or vessel, when and where originally built, and the length of time the same has been running. And he or they shall also state whether, in his or their opinion, the said boat or vessel is sound, and in all respects seaworthy, and fit to be used for the trans-

portation of freight or passengers ; for which service, so performed upon each and every boat or vessel, the inspectors shall each be paid and allowed by said master or owner applying for such inspection the sum of five dollars.

SEC. 5. *And be it further enacted*, That the person or persons who shall be called upon to inspect the boilers and machinery of any steamboat or vessel, under the provisions of this act, shall, after a thorough examination of the same, make a certificate, in which he or they shall state his or their opinion whether said boilers are sound and fit for use, together with the age of said boilers ; and duplicates thereof shall be delivered to the owner or master of such vessel, one of which it shall be the duty of the said master and owner to deliver to the collector or surveyor of the port whenever he shall apply for a license, or for a renewal of a license ; the other he shall cause to be posted up, and kept in some conspicuous part of said boat, for the information of the public ; and for each and every inspection so made, each of the said inspectors shall be paid by the said master or owner applying the sum of five dollars.

SEC. 6. *And be it further enacted*, That it shall be the duty of the owners and masters of steamboats to cause the inspection provided under the fourth section of this act to be made at least once in every twelve months, and the examination required by the fifth section, at least once in every six months, and deliver to the collector or surveyor of the port where his boat or vessel has been enrolled or licensed the certificate of such inspection ; and, on a failure thereof, he or they shall forfeit the license granted to such boat or vessel, and be subject to the same penalty as though he had run said boat or vessel without having obtained such license, to be recovered in like manner. And it shall be the duty of the owners and masters of the steamboats licensed in pursuance of the provisions of this act to employ on board of their respective boats a competent number of experienced and skilful engineers, and, in case of neglect to do so, the said owners and masters shall be held responsible for all damages to the property of any passenger on board of any boat, occasioned by an explosion of the boiler or any derangement of the engine or machinery of any boat.

SEC. 7. *And be it further enacted*, That whenever the master of any boat or vessel, or the person or persons charged with navigating said boat or vessel, which is propelled in whole or in part by steam, shall stop the motion or headway of said boat or vessel, or when said boat or vessel shall be stopped for the purpose of discharging or taking in cargo, fuel, or passengers, he or they shall open the safety-valve, so as to keep the steam down in said boiler as near as practicable to what it is when the said boat or vessel is under headway, under the penalty of two hundred dollars for each and every offence.

SEC. 8. *And be it further enacted*, That it shall be the duty of the owner and master of every steam vessel engaged in the transportation of freight or passengers, at sea or on the lakes, Champlain, Ontario, Erie, Huron, Superior, and Michigan, the tonnage of which vessel shall not exceed two hundred tons, to provide and to carry with the said boat or vessel, upon each and every voyage, two long-boats or yawls, each of which shall be competent to carry at least twenty persons; and where the tonnage of said vessel shall exceed two hundred tons, it shall be the duty of the owner and master to provide and carry, as aforesaid, not less than three long-boats or yawls, of the same or larger dimensions; and for every failure in these particulars, the said master and owner shall forfeit and pay three hundred dollars.

SEC. 9. *And be it further enacted*, That it shall be the duty of the master and owner of every steam vessel employed on either of the lakes mentioned in the last section, or on the sea, to provide, as a part of the necessary furniture, a suction hose and fire-engine and hose suitable to be worked on said boat in case of fire, and carry the same upon each and every voyage, in good order; and that iron rods or chains shall be employed and used in the navigating of all steamboats, instead of wheel or tiller ropes; and for a failure to do which, they, and each of them, shall forfeit and pay the sum of three hundred dollars.

SEC. 10. *And be it further enacted*, That it shall be the duty of the master and owner of every steamboat, running between sunset and sunrise, to carry one or more signal lights, that may be seen by other boats navigating the same waters, under the penalty of two hundred dollars.

SEC. 11. *And be it further enacted*, That the penalties imposed by this act may be sued for and recovered in the name of the United States, in the district or circuit court of such district or circuit where the offence shall have been committed, or forfeiture incurred, or in which the owner or master of said vessel may reside, one half to the use of the informer, and the other to the use of the United States; or the said penalty may be prosecuted for by indictment in either of the said courts.

SEC. 12. *And be it further enacted*, That every captain, engineer, pilot, or other person employed on board of any steamboat or vessel propelled in whole or in part by steam, by whose misconduct, negligence, or inattention to his or their respective duties, the life or lives of any person or persons on board said vessel may be destroyed, shall be deemed guilty of manslaughter, and, upon conviction thereof before any circuit court in the United States, shall be sentenced to confinement at hard labor for a period not more than ten years.

SEC. 13. *And be it further enacted*, That in all suits and actions against proprietors of steamboats for injuries arising to person or property from

the bursting of the boiler of any steamboat, or the collapse of a flue, or other injurious escape of steam the fact of such bursting, collapse, or injurious escape of steam shall be taken as full *prima facie* evidence, sufficient to charge the defendant, or those in his employment, with negligence, until he shall show that no negligence has been committed by him or those in his employment.

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ACT OF 1840, CHAPTER 6 (5 U. S. Stats. at Large, 370).

*An Act to cancel the Bonds given to secure Duties upon Vessels and their Cargoes, employed in the Whale Fishery, and to make Registers, lawful Papers for such Vessels.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all vessels which have cleared, or hereafter may clear, with registers for the purpose of engaging in the whale fishery, shall be deemed to have lawful and sufficient papers for such voyages, securing the privileges and rights of registered vessels, and the privileges and exemptions of vessels enrolled and licensed for the fisheries; and all vessels which have been enrolled and licensed for like voyages shall have the same privileges and measure of protection as if they had sailed with registers if such voyages are completed or until they are completed.

SEC. 2. *And be it further enacted,* That all the provisions of the first section of the act, entitled "An act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American seamen," passed on the twenty-eighth day of February, Anno Domini eighteen hundred and three, shall hereafter apply and be in full force as to vessels engaged in the whale fishery in the same manner and to the same extent as the same is now in force and applies to vessels bound on a foreign voyage.

SEC. 3. *And be it further enacted,* That all forfeitures, fees, duties, and charges of every description required of the crews of such vessels, or assessed upon the vessels or cargoes, being the produce of such fishery, because of a supposed insufficiency of a register to exempt them from such claims, are hereby remitted; and all bonds given for such cause are hereby cancelled, and the secretary of the treasury is hereby required to refund all such moneys as have been, or which may be, paid into the treasury, to the rightful claimants, out of the revenues in his hands.

## ACT OF 1840, CHAPTER 48 (5 U. S. Stats. at Large, 394).

*An Act in addition to the several Acts regulating the Shipment and Discharge of Seamen, and the Duties of Consuls.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, As follows :*

First. The duplicate list of the crew of any vessel bound on a foreign voyage, made out pursuant to the act of February twenty-eighth, eighteen hundred and three, shall be a fair copy in one uniform handwriting, without erasure or interlineation.

Second. It shall be the duty of the owners of every such vessel to obtain from the collector of the customs of the district from which the clearance is made, a true and certified copy of the shipping articles, containing the names of the crew, which shall be written in a uniform hand, without erasures or interlineations.

Third. These documents which shall be deemed to contain all the conditions of contract with the crew as to their service, pay, voyage, and all other things, shall be produced by the master, and laid before any consul, or other commercial agent of the United States, whenever he may deem their contents necessary to enable him to discharge the duties imposed upon him by law toward any mariner applying to him for his aid or assistance.

Fourth. All interlineations, erasures, or writing in a hand different from that in which such duplicates were originally made, shall be deemed fraudulent alterations, working no change in such papers, unless satisfactorily explained in a manner consistent with innocent purposes and the provisions of law which guard the rights of mariners.

Fifth. Any consul of the United States, and in case there is none resident at a foreign port, or he is unable to discharge his duties, then any commercial agent of the United States authorized to perform such duties, may, upon the application of both the master and any mariner of the vessel under his command, discharge such mariner, if he thinks it expedient, without requiring the payment of three months' wages, under the provisions of the act of the twenty-eighth of February, eighteen hundred and three, or any other sum of money.<sup>1</sup>

Sixth. Any consul, or other commercial agent, may also, on such joint application, discharge any mariner on such terms as will, in his judgment, save the United States from the liability to support such mariner, if the master gives his voluntary assent to such terms, and conforms thereto.<sup>1</sup>

Seventh. When a mariner is so discharged, the officer discharging him

<sup>1</sup> The paragraphs 5, 6, and 7 are repealed by Act 1856, c. 127, § 33.

shall make an official entry thereof upon the list of the crew and the shipping articles.<sup>1</sup>

Eighth. Whenever any master shall ship a mariner in a foreign port, he shall forthwith take the list of his crew and the duplicate of the shipping articles to the consul, or person who discharges the duties of the office at that port, who shall make the proper entries thereon, setting forth the contract, and describing the person of the mariner; and thereupon the bond originally given for the return of the men shall embrace each person so shipped.

Ninth. When any mariner shall complain that the voyage is continued contrary to his agreement, or that he has fulfilled his contract, the consul, or other commercial agent performing like duties, may examine into the same by an inspection of the articles of agreement; and if on the face of them he finds the complaint to be well founded, he shall discharge the mariner, if he desires it, and require of the master an advance, beyond the lawful claims of such mariner, of three months' wages, as provided in the act of February twenty-eighth, eighteen hundred and three; and in case the lawful claims of such mariner are not paid upon his discharge, the arrears shall from that time bear an interest of twenty per centum: *Provided, however*, If the consul or other commercial agent shall be satisfied the contract has expired, or the voyage been protracted by circumstances beyond the control of the master, and without any design on his part to violate the articles of shipment, then he may, if he deems it just, discharge the mariner without exacting the three months' additional pay.

Tenth. All shipments of seamen, made contrary to the provisions of this and other acts of Congress, shall be void; and any seaman so shipped may leave the service at any time, and demand the highest rate of wages paid to any seaman shipped for the voyage, or the sum agreed to be given him at his shipment.

Eleventh. It shall be the duty of consuls and commercial agents to reclaim deserters and discountenance insubordination by every means within their power; and where the local authorities can be usefully employed for that purpose, to lend their aid and use their exertions to that end in the most effectual manner.

Twelfth. If the first officer, or any officer, and a majority of the crew of any vessel shall make complaint in writing that she is in an unsuitable condition to go to sea, because she is leaky, or insufficiently supplied with sails, rigging, anchors, or any other equipment, or that the crew is insufficient to man her, or that her provisions, stores, and supplies are not, or have not been, during the voyage sufficient and wholesome, thereupon, in any of these or like cases, the consul or commercial agent who may dis-

<sup>1</sup> The paragraphs 5, 6, and 7 are repealed by Act of 1856, c. 127, § 33.

charge any duties of a consul shall appoint two disinterested, competent practical men, acquainted with maritime affairs, to examine into the causes of complaint, who shall in their report state what defects and deficiencies, if any, they find to be well founded, as well as what, in their judgment, ought to be done to put the vessel in order for the continuance of her voyage.<sup>1</sup>

Thirteenth. The inspectors so appointed shall have full power to examine the vessel and whatever is aboard of her, so far as is pertinent to their inquiry, and also to hear and receive any other proofs which the ends of justice may require, and if, upon a view of the whole proceedings, the consul, or other commercial agent shall be satisfied therewith, he may approve the whole or any part of the report, and shall certify such approval, and if he dissents, shall also certify his reasons for so dissenting.

Fourteenth. The inspectors in their report shall also state whether, in their opinion, the vessel was sent to sea unsuitably provided in any important or essential particular, by neglect or design, or through mistake or accident, and in case it was by neglect or design, and the consul or other commercial agent approves of such finding, he shall discharge such of the crew as require it, each of whom shall be entitled to three months' pay in addition to his wages to the time of discharge; but, if in the opinion of the inspectors the defects or deficiencies found to exist have been the result of mistake or accident, and could not, in the exercise of ordinary care, have been known and provided against before the sailing of the vessel, and the master shall, in a reasonable time, remove or remedy the causes of complaint, then the crew shall remain and discharge their duty; otherwise they shall, upon their request, be discharged, and receive each one month's wages in addition to the pay up to the time of discharge.

Fifteenth. The master shall pay all such reasonable charges in the premises as shall be officially certified to him under the hand of the consul or other commercial agent, but in case the inspectors report that the complaint is without any good and sufficient cause, the master may retain from the wages of the complainants, in proportion to the pay of each, the amount of such charges, with such reasonable damages for detention on that account as the consul or other commercial agent directing the inquiry may officially certify.

Sixteenth. The crew of any vessel shall have the fullest liberty to lay their complaints before the consul or commercial agent in any foreign port, and shall in no respect be restrained or hindered therein by the master or any officer, unless some sufficient and valid objection exist against their landing; in which case, if any mariner desire to see the consul or com-

<sup>1</sup> See act of 1850, c. 27, § 6.



mercial agent, it shall be the duty of the master to acquaint him with it forthwith ; stating the reason why the mariner is not permitted to land, and that he is desired to come on board ; whereupon it shall be the duty of such consul or commercial agent to repair on board and inquire into the causes of the complaint, and to proceed thereon as this act directs.

Seventeenth. In all cases where deserters are apprehended, the consul or commercial agent shall inquire into the facts ; and, if satisfied that the desertion was caused by unusual or cruel treatment, the mariner shall be discharged, and receive, in addition to his wages to the time of the discharge, three months' pay ; and the officer discharging him shall enter upon the crew-list and shipping articles the cause of discharge, and the particulars in which the cruelty or unusual treatment consisted, and subscribe his name thereto officially.

Eighteenth. If any consul or commercial agent shall neglect or omit to perform, seasonably, the duties hereby imposed upon him, or shall be guilty of any malversation or abuse of power, he shall be liable to any injured person for all damage occasioned thereby ; and for all malversation and corrupt conduct in office, he shall be liable to indictment, and, on conviction by any court of competent jurisdiction, shall be fined not less than one nor more than ten thousand dollars, and be imprisoned not less than one nor more than five years.

Nineteenth. If any master of a vessel shall proceed on a foreign voyage without the documents herein required, or refuse to produce them when required, or to perform the duties imposed by this act, or shall violate the provisions thereof, he shall be liable to each and every individual injured thereby, in damages, and shall, in addition thereto, be liable to pay a fine of one hundred dollars for each and every offence, to be recovered by any person suing therefor in any court of the United States in the district where such delinquent may reside or be found.

Twentieth. It shall be the duty of the boarding officer to report all violations of this act to the collector of the port where any vessel may arrive, and the collector shall report the same to the secretary of the treasury and to the attorney of the United States in his district.

Twenty-first. This act shall be in force from and after the first day of October next ; and shall not apply to vessels which shall have sailed from ports of the United States before that time.

## ACT OF 1842, CHAPTER 188 (5 U. S. Stats. at Large, 516).

*An Act further supplementary to an Act, entitled "An Act to establish the Judicial Courts of the United States," passed the twenty-fourth of September, seventeen hundred and eighty-nine.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the commissioners who now are, or hereafter may be, appointed by the circuit courts of the United States to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes, shall and may exercise all the powers that any justice of the peace, or other magistrate, of any of the United States may now exercise in respect to offenders for any crime or offence against the United States, by arresting, imprisoning, or bailing the same, under and by virtue of the thirty-third section of the act of the twenty-fourth of September, Anno Domini seventeen hundred and eighty-nine, entitled "An act to establish the judicial courts of the United States ;" and who shall and may exercise all the powers that any judge or justice of the peace may exercise under and in virtue of the sixth section of the act passed the twentieth of July, Anno Domini seventeen hundred and ninety, entitled "An act for the government and regulation of seamen in the merchant service."

SEC. 2. *And be it further enacted,* That in all hearings before any justice or judge of the United States, or any commissioner appointed as aforesaid, under and in virtue of the said thirty-third section of the act entitled "An act to establish the judicial courts of the United States," it shall be lawful for such justice, judge, or commissioner, where the crime or offence is charged to have been committed on the high seas or elsewhere within the admiralty and maritime jurisdiction of the United States, in his discretion to require a recognizance of any witness produced in behalf of the accused, with such surety or sureties as he may judge necessary, as well as in behalf of the United States, for their appearing and giving testimony, at the trial of the cause, whose testimony, in his opinion, is important for the purposes of justice at the trial of the cause, and is in danger of being otherwise lost ; and such witnesses shall be entitled to receive from the United States the usual compensation allowed to Government witnesses for their detention and attendance, if they shall appear and be ready to give testimony at the trial.

SEC. 3. *And be it further enacted,* That the district courts of the United States shall have concurrent jurisdiction with the circuit courts of all crimes and offences against the United States, the punishment of which is not capital. And in such of the districts where the business of the court

may require it to be done for the purposes of justice, and to prevent undue expenses and delays in the trial of criminal causes, the said district courts shall hold monthly adjournments of the regular terms thereof for the trial and hearing of such causes.

SEC. 4. *And be it further enacted*, That, in lieu of the punishment now prescribed by the sixteenth section of the act of Congress, entitled, "An act for the punishment of certain crimes against the United States," passed on the thirtieth day of April, Anno Domini one thousand seven hundred and ninety, for the offences in the said section mentioned, the punishment of the offender, upon conviction thereof, shall be by fine not exceeding one thousand dollars, or by imprisonment not exceeding one year, or by both, according to the nature and aggravation of the offence.

SEC. 5. *And be it further enacted*, That the district courts as courts of admiralty, and the circuit courts as courts of equity, shall be deemed always open for the purpose of filing libels, bills, petitions, answers, pleas, and other pleadings, for issuing and returning mesne and final process and commissions, and for making and directing all interlocutory motions, orders, rules, and other proceedings whatever, preparatory to the hearing of all causes pending therein upon their merits. And it shall be competent for any judge of the court, upon reasonable notice to the parties, in the clerk's office or at chambers, and in vacation as well as in term, to make and direct, and award all such process, commissions and interlocutory orders, rules, and other proceedings, whenever the same are not grantable of course according to the rules and practice of the court.

SEC. 6. *And be it further enacted*, That the Supreme Court shall have full power and authority, from time to time, to prescribe, and regulate, and alter the forms of writs and other process to be used and issued in the district and circuit courts of the United States, and the forms and modes of framing and filing libels, bills, answers, and other proceedings and pleadings, in suits at common law or in admiralty and in equity pending in the said courts, and also the forms and modes of taking and obtaining evidence, and of obtaining discovery, and generally the forms and modes of proceeding to obtain relief, and the forms and modes of drawing up, entering, and enrolling decrees, and the forms and modes of proceeding before trustees appointed by the court, and generally to regulate the whole practice of the said courts, so as to prevent delays, and to promote brevity and succinctness in all pleadings and proceedings therein, and to abolish all unnecessary costs and expenses in any suit therein.

SEC. 7. *And be it further enacted*, That, for the purpose of further diminishing the costs and expenses in suits and proceedings in the said courts, the Supreme Court shall have full power and authority, from time to time, to make and prescribe regulations to the said district and circuit courts, as

to the taxation and payment of costs in all suits and proceedings therein ; and to make and prescribe a table of the various items of costs which shall be taxable and allowed in all suits, to the parties, their attorneys, solicitors, and proctors, to the clerk of the court, to the marshal of the district, and his deputies, and other officers serving process, to witnesses, and to all other persons whose services are usually taxable in bills of costs. And the items so stated in the said table, and none others, shall be taxable or allowed in bills of costs ; and they shall be fixed as low as they reasonably can be, with a due regard to the nature of the duties and services which shall be performed by the various officers and persons aforesaid, and shall in no case exceed the costs and expenses now authorized, where the same are provided for by existing laws.

SEC. 8. *And be it further enacted*, That on all judgments in civil cases, hereafter recovered in the circuit or district courts of the United States, interest shall be allowed, and may be levied by the marshal, under process of execution issued thereon, in all cases where, by the law of the State in which such circuit or district court shall be held, interest may be levied under process of execution on judgments recovered in the courts of such State, to be calculated from the date of the judgment, and at such rate per annum, as is allowed by law, on judgments recovered in the courts of such State.

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ACT OF 1843, CHAPTER 49 (5 U. S. Stats. at Large, 602).

*An Act amendatory of "An Act for the Relief of sick and disabled Seamen."*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provision and penalties of the act of the sixteenth of July, one thousand seven hundred and ninety-eight, entitled "An act for the relief of sick and disabled seamen," be, and the same hereby are, extended to the masters, owners, and seamen of registered vessels employed in carrying on the coasting trade ; and the secretary of the treasury is authorized and directed to issue such instructions to the collectors of the various ports as shall secure the collection of hospital money from said seamen, masters, and owners.

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ACT OF 1843, CHAPTER 94 (5 U. S. Stats. at Large, 626).

*An Act to modify the Act entitled "An Act to provide for the better security of the Lives of Passengers on board of Vessels propelled in whole or in part by Steam, approved July seventh, eighteen hundred and thirty-eight."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every boat or

vessel which existing laws require to be registered, and which is propelled in whole or in part by steam, shall be provided with such additional apparatus, or means as, in the opinion of the inspector of steamboats, shall be requisite to steer the boat or vessel, to be located in such part of the boat or vessel as the inspector may deem best to enable the officers and crew to steer and control the boat or vessel, in case the pilot or man at the wheel is driven from the same by fire; and no boat or vessel, exclusively propelled by steam, shall be registered, after the passage of this act, unless the owner, master, or other proper person, shall file with the collector, or other proper officer, the certificate of the inspector, stating that suitable means have been provided to steer the boat or vessel, in case the pilot or man at the wheel is driven therefrom by fire.

SEC. 2. *And be it further enacted*, That it shall be lawful in all vessels or boats propelled in whole or in part by steam, and which shall be provided with additional apparatus or means to steer the same, as required by the first section of this act, to use wheel or tiller ropes, composed of hemp or other good and sufficient material around the barrel or axle of the wheel, and to a distance not exceeding twenty-two feet therefrom, and also in connecting the tiller or rudder yoke with iron rods or chains used for working the rudder: *Provided*, That no more rope for this purpose shall be used than is sufficient to extend from the connecting points of the tiller or rudder yoke placed in any working position beyond the nearest blocks or rollers, and give sufficient play to work the ropes on such blocks or rollers: *And provided, further*, That there shall be chains extending the whole distance of the ropes, so connected with the tiller or rudder yoke, and attached or fastened to the tiller or rudder yoke, and the iron chains or rods extending towards the wheel, in such manner as will take immediate effect, and work the rudder in case the ropes are burnt or otherwise rendered useless.

SEC. 3. *And be it further enacted*, That the master and owner, and all all others interested in vessels navigating Lakes Champlain, Ontario, Erie, Huron, Superior, and Michigan, or any of them, and which are propelled by sails and Ericsson's propeller, and used exclusively in carrying freight, shall from and after the passage of this act, be exempt from liability or fine for failing to provide, as a part of the necessary furniture of such vessel, a suction hose and fire engine and hose suitable to be worked on such vessel in case of fire, or more than one long boat or yawl.

SEC. 4. *And be it further enacted*, That it shall be lawful for the court before which any suit, information, or indictment is or shall be pending for the violation, before the passage of this act, of so much of the ninth section of the act aforesaid as requires "that iron rods or chains shall be employed and used in the navigation of all steamboats, instead of wheel and tiller ropes," to order such suit, information, or indictment to be discon-

tinued, on such terms as to costs as the court shall judge to be just and reasonable: *Provided*, That the defendant or defendants in such prosecution shall cause it to appear, by affidavit or otherwise, to the satisfaction of the court, that he or they had failed to use iron rods or chains in the navigation of his or their boat or boats, from a well-grounded apprehension that such rods or chains could not be employed for the purpose aforesaid with safety.

SEC. 5. *And be it further enacted*, That in execution of the authority vested in him by the second section of the joint resolution "authorizing experiments to be made for the purpose of testing Samuel Colt's submarine battery and for other purposes," approved August thirty-first, one thousand eight hundred and forty-two, the secretary of the navy shall appoint a board of examiners, consisting of three persons, of thorough knowledge as to the structure and use of the steam-engine, whose duty it shall be to make experimental trials of such inventions and plans designed to prevent the explosion of steam boilers and collapsing of flues as they may deem worthy of examination, and report the result of their experiments, with an expression of their opinion as to the relative merits and efficacy of such inventions and plans, which report the secretary shall cause to be laid before Congress, at its next session. It shall also be the duty of said examiners to examine and report the relative strength of copper and iron boilers of equal thickness, and what amount of steam to the square inch each, when sound, is capable of working with safety; and whether hydrostatic pressure, or what other plan is best for testing the strength of boilers under the inspection laws; and what limitations as to the force or pressure of steam to the square inch, in proportion to the ascertained capacity of a boiler to resist, it would be proper to establish by law for the more certain prevention of explosions.

SEC. 6. *And be it further enacted*, That so much of the act aforesaid as is inconsistent with the provisions of this act shall be, and the same is hereby, repealed.

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ACT OF 1845, CHAPTER 17 (5 U. S. Stats. at Large, 725).

*An Act to amend the Act entitled "An Act to provide for the Enlistment of Boys for the Naval Service, and to extend the Term of Enlistment of Seamen."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, from and after the passage of this act, the provisions of the second and third sections of the act entitled, "An act to provide for the enlistment of boys for the naval service, and to extend the term of the enlistment of seamen," approved March second, one thousand eight hundred and thirty-seven, which

authorize and provide for the detention of any person enlisted for the navy after the expiration of the enlistment, until the return of such person to the United States, shall be understood and construed to authorize and provide for the detention of such person until the arrival of the vessel in which he shall be so detained at a port of the United States, and until he shall have received his regular discharge by order of the secretary of the navy : *Provided*, That such detention shall not exceed the term of thirty days from the time of the arrival of the said vessel in a port of the United States.

SEC. 2. *And be it further enacted*, That the commanding officer of any vessel, squadron, or fleet of the navy of the United States, when upon the high seas, or in any foreign port where there is no resident consul of the United States, shall be and is hereby authorized and empowered to exercise all the powers of a consul in relation to mariners of the United States.

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ACT OF 1845, CHAPTER 20 (5 U. S. Stats. at Large, 726).

*An Act extending the Jurisdiction of the District Courts to certain Cases, upon the Lakes and Navigable Waters connecting the same.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the district courts of the United States shall have, possess, and exercise the same jurisdiction in matters of contract and tort, arising in, upon, or concerning steamboats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States ; and in all suits brought in such courts in all such matters of contract or tort, the remedies, and the forms of process, and the modes of proceeding, shall be the same as are or may be used by such courts in cases of admiralty and maritime jurisdiction ; and the maritime law of the United States, so far as the same is or may be applicable thereto, shall constitute the rule of decision in such suits, in the same manner, and to the same extent, and with the same equities, as it now does in cases of admiralty and maritime jurisdiction ; saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it ; and saving also to the parties the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by

the State laws, where such steamer or other vessel is employed in such business of commerce and navigation.

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ACT OF 1846, CHAPTER 60 (9 U. S. Stats. at Large, 38).

*An Act to exempt Canal Boats from the Payment of Fees and Hospital Money.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the owner or owners, master or captain, or other persons employed in navigating canal boats without masts or steam-power, now by law required to be registered, licensed, or enrolled and licensed, shall not be required to pay any marine hospital tax or money ; nor shall the persons employed to navigate such boats receive any benefit or advantage from the marine hospital fund ; nor shall such owner or owners, master or captain, or other persons, be required to pay fees, or make any compensation for such register, license, or enrolment and license, nor shall any such boat be subject to be libelled in any of the United States courts for the wages of any person or persons who may be employed on board thereof, or in navigating the same.

SEC. 2. *And be it further enacted,* That all acts, and parts of acts, repugnant to the provisions of this act, be, and the same are hereby, repealed.

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ACT OF 1846, CHAPTER 98 (9 U. S. Stats. at Large, 72).

*An Act to regulate the Proceedings in the Circuit and District Courts of the United States, and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Circuit Court of the United States for the Southern District of New York shall hereafter be held on the third Monday in October, instead of the last Monday in November ; and that all writs, pleas, suits, recognizances, indictments, and all other proceedings, civil and criminal, shall be returnable to and have day in court, and shall be heard, tried, and proceeded with, by the said court, in the same manner as might and ought to have been done, if the court had been held at the time heretofore directed by law ; and it is further provided, that the term of the Circuit Court appointed by law to be held on the last Monday in July, in each year, in said district, shall not hereafter be holden.

SEC. 2. *And be it further enacted,* That whenever the district attorney shall deem it necessary, it shall be lawful for any Circuit Court, in session, by order entered on its minutes, to remit to the next term or session of the District Court of the same district any indictment pending in the said



Circuit Court, when the offence or offences therein charged may be cognizable by the said District Court; and in like manner it shall be lawful for any District Court to remit to the next term or session of the Circuit Court of the same district any indictment pending in the said District Court; and such remission shall carry with it all recognizances, processes, and proceedings pending in the case in the court from which the remission is made; and the court to which such remission is made shall, after the order of remission is filed therein, act and proceed in the case as if the indictment, and all other proceedings in the same, had been originated in said court.

SEC. 3. *And be it further enacted*, That it shall be lawful for the grand juries impanelled and sworn in any District Court to take cognizance of all crimes and offences within the jurisdiction of the said Circuit and District Courts, and every indictment for a capital offence, presented to the District Court, shall, by order entered on the minutes of the court, be remitted to the next term and session of the Circuit Court, together with all recognizances taken therein; and on filing such order and indictment with the clerk of said Circuit Court, that court shall thereafter proceed thereupon, the same as if the indictment had been originally found and presented in said court; and the said District Court may, moreover, in like manner, remit to the Circuit Court any indictment pending in said District Court, when, in the opinion of the court, difficult and important questions of law are involved in the case; and the proceedings thereupon shall thereafter be the same in the Circuit Court as if such indictment had been originally found and presented therein. That no grand jury shall hereafter be summoned to attend any Circuit or District Court of the United States, unless the judge of such District Court, or one of the judges of such Circuit Court, shall, in his own discretion, or upon a notification by the district attorney that such jury will be needed, order a *venire* to be issued therefor: *Provided*, That nothing herein shall prevent either of said courts in term from directing a grand jury to be summoned and impanelled, whenever, in its judgment, it may be proper to do so, and at such time as it may direct: *And provided further*, That nothing herein shall operate to extend beyond what the law now permits the imprisonment before indictment found of an individual accused of a crime or offence, or the time during which an individual thus accused may be held under recognizance before indictment found.

SEC. 4. *And be it further enacted*, That any party charged with a criminal offence, and admitted to bail, may, in vacation, be arrested by his bail, and delivered to the marshal or his deputy, before any judge or other officer having power to commit for such offence; and at the request of such bail, the judge or other officer shall recommit the party so arrested

to the custody of the marshal, and indorse on the recognizance, or certified copy thereof, the discharge and *exoneratur* of such bail; and the party so committed shall therefrom be held in custody until discharged by due course of law.

SEC. 5. *And be it further enacted*, That if any captain, or other officer or mariner, of a ship or vessel on the high seas, or any other waters within the admiralty and maritime jurisdiction of the United States, shall piratically or feloniously run away with such ship or vessel, or any goods or merchandise on board such ship or vessel to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate, every such person so offending shall be deemed guilty of felony, and, on conviction thereof, shall be punished by fine not exceeding ten thousand dollars, or by imprisonment not exceeding ten years, or both, according to the nature and aggravation of the offence.

SEC. 6. *And be it further enacted*, That upon the necessary proof being made to any judge of the United States, or other magistrate having authority to commit on criminal charges against the laws of the United States, that a person previously admitted to bail on any such criminal charge is about to abscond, and that his bail is insufficient, it shall and may be lawful for any such judge or magistrate to require such person to give better security, or, for default thereof, to cause him to be committed to prison; and, to that end, an order for his arrest may be indorsed on the former commitment, or a new warrant therefor may be issued by such judge or magistrate, setting forth the cause thereof.

SEC. 7. *And be it further enacted*, That, on the application of any attorney of the United States for any district, and upon satisfactory proof of the materiality of the testimony of any person who shall be a competent witness, and whose testimony shall, in the opinion of any judge of the United States, be necessary upon the trial of any criminal cause or proceeding in which the United States shall be a party or interested, any such judge may compel such person, so required or deemed by him necessary as a witness, to give recognizance, with or without sureties in his discretion, to appear on the trial of said cause or proceeding and give his testimony therein; and, for that purpose, the said judge may issue a warrant against such person, under his hand, with or without seal, directed to the marshal or other officer authorized to execute criminal or civil process in behalf of the United States, to arrest such person and carry him before such judge. And in case the person so arrested shall neglect or refuse to give said recognizance in the manner required by said judge, the said judge may issue a warrant of commitment against such person, which shall be delivered to said officer, whose duty it shall be to convey such person to the prison mentioned in said mittimus. And the said person

shall remain in confinement until he shall be removed to the court for the purpose of giving his testimony, or until he shall have given the recognizance required by said judge.

SEC. 8. *And be it further enacted*, That so much of the act entitled "An Act to increase and regulate the Terms of the Circuit and District Courts for the Northern District of New York," passed July seventh, eighteen hundred and thirty-eight, as requires all issues of fact in the said Circuit Court in which the cause of action shall have arisen west of the line in the said act for that purpose designated to be tried at the term of said Circuit Court to be held at Canandaigua, and all issues of fact in the said court which shall have arisen east of the said line to be tried at Albany, be, and the same is hereby, repealed. And that, in addition to the courts now provided by law to be held in the Northern District of New York, a stated session of the Circuit Court of the United States for said Northern District shall be held annually at the City Hall, in the city of Albany, on the third Tuesday of May.

SEC. 9. *And be it further enacted*, That no process issued or proceedings pending in either of the said courts shall be avoided or impaired by the change hereby made in the time and place of holding such court; but all process, bail bonds, and recognizances, returnable at either of the times and places hereby altered, shall be deemed and held to be returnable at the time and place herein designated in lieu thereof, in the same manner as if the same had in terms been made so returnable, and shall have full effect accordingly. And all continuances may be made to conform to the provisions of this act.

SEC. 10. *And be it further enacted*, That hereafter a term of the District Court for the Northern District of New York shall be held in the village of Auburn, on the third Tuesday in August in each year. *And it is further provided*, That the Term of the District Court now required by law to be held at the city of Buffalo, on the second Tuesday of October in each year, shall hereafter be held on the second Tuesday of November in each year.

SEC. 11. *And be it further enacted*, That, whenever any indictment shall be pending in any court of the United States, and any defendant thereto shall make an affidavit setting forth that there are witnesses whose evidence is material to his defence, and that he cannot safely go to trial without them, what he expects to prove by each of them, that they are within the district in which the court is held, or within one hundred miles of the place of trial, and that he is not possessed of sufficient means, and is actually unable to pay the fees of such witnesses, the court in term, or any judge thereof in vacation, may, if it appear proper to do so, order that such witnesses be subpœnaed, if found within the limits aforesaid; and in

such case, the costs incurred by such process, and the fees of such witnesses shall be paid in the same manner that similar costs and fees are paid in case of witnesses subpoenaed in behalf of the United States.

SEC. 12. *And be it further enacted*, That all acts and parts of acts inconsistent with the provisions of this act shall be, and the same are hereby, repealed: *Provided, nevertheless*, That they shall be and remain in full force for the punishment of any crime or offence committed before the passing of this act.

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ACT OF 1847, CHAPTER 51 ( 9 U. S. Stats. at Large, 175).

*An Act to provide for the Punishment of Piracy in certain Cases.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any subject or citizen of any foreign State, who shall be found and taken on the sea, making war upon the United States, or cruising against the vessels and property thereof, or of the citizens of the same, contrary to the provisions of any treaty existing between the United States and the State of which such person is a citizen or subject, when by such treaty such acts of such persons are declared to be piracy, may be arraigned, tried, convicted, and punished before any circuit court of the United States for the district into which such person may be brought, or shall be found, in the same manner as other persons charged with piracy may be arraigned, tried, convicted, and punished in said courts.

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ACT OF 1847, CHAPTER 55 ( 9 U. S. Stats. at Large, 181).

*An Act for the Reduction of the Costs and Expenses of Proceedings in Admiralty against Ships and Vessels.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in any case brought in the courts of the United States, exercising jurisdiction in admiralty, where a warrant of arrest, or other process *in rem*, shall be issued, it shall be the duty of the marshal to stay the execution of such process, or to discharge the property arrested if the same has been levied, on receiving from the claimant of the same a bond or stipulation in double the amount claimed by the libellant, with sufficient surety, to be approved by the judge of the said court, or, in his absence, by the collector of the port, conditioned to abide and answer the decree of the court in such cause; and such bond or stipulation shall be returned to the said court, and judgment on the same, both against the principal and sureties, may be recovered at the time of

rendering the decree in the original cause : *Provided*, That the entire costs in any such case, in which the amount recovered by the libellant shall not exceed one hundred dollars, shall not be more than fifty per cent of the amount recovered in the same, which costs shall be applied, first, to the payment of the usual fees for witnesses, and the commissioner, where a commissioner shall act on the case, and the residue to be divided, *pro rata*, between the clerk and marshal, under the direction of the judge of the court where the cause may be tried : *Provided, further*, That no attorney's or proctor's fees shall be allowed or paid out of the said costs.

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ACT OF 1848, CHAPTER 48 (9 U. S. Stats. at Large, 232).

*An Act extending Privileges to American Vessels engaged in a certain mentioned Trade, and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall hereafter be lawful for any steamship or other vessel, on being duly registered in pursuance of the laws of the United States, to engage in trade between one port in the United States and one or more ports within the same, with the privilege of touching at one or more foreign ports during the voyage, and land and take in thereat merchandise, passengers, and their baggage, and letters, and mails : *Provided*, That all such vessels shall be furnished by the collectors of the ports at which they shall take in their cargoes in the United States, with certified manifests, setting forth the particulars of the cargoes, the marks, number of packages, by whom shipped, to whom consigned, at what port to be delivered ; designating such goods as are entitled to drawback, or to the privilege of being placed in warehouse ; and the masters of all such vessels shall, on their arrival at any port of the United States from any foreign port at which such vessel may have touched, as herein provided, conform to the laws providing for the delivery of manifests, of cargo, and passengers taken on board at such foreign port, and all other laws regulating the report and entry of vessels from foreign ports, and be subject to all the penalties therein prescribed.

SEC. 2. *And be it further enacted*, That all vessels, and their cargoes, engaged in the trade referred to in this act shall become subject to the provisions of existing collection and revenue laws on arrival in any port in the United States : *Provided*, That any foreign goods, wares, or merchandise, taken in at one port of the United States, to be conveyed in said vessels to any other port within the same, either under the provisions of the warehousing act of sixth August, eighteen hundred and forty-six, or under the laws regulating the transportation coastwise of goods entitled to draw-

back, as well as any goods, wares, or merchandise not entitled to drawback, but on which the import duties chargeable by law shall have been duly paid, shall not become subject to any import duty by reason of the vessel in which they may arrive having touched at a foreign port during the voyage, in pursuance of the privilege given in this act.

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ACT OF 1848, CHAPTER 141 (9 U. S. Stats. at Large, 274).

*An Act to authorize the Secretary of the Treasury to license Yachts, and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the secretary of the treasury is hereby authorized to cause yachts used and employed exclusively as pleasure vessels, and designed as models of naval architecture, and now entitled to be enrolled as American vessels, to be licensed on terms which will authorize them to proceed from port to port of the United States without entering or clearing at the custom-house. Such license shall be in such form as the secretary of the treasury may prescribe: *Provided*, Such vessels so enrolled and licensed shall not be allowed to transport merchandise or carry passengers for pay: *And provided further*, That the owner of any such vessel, before taking out such license, shall give a bond in such form and for such amount as the secretary of the treasury shall prescribe, conditional that the said vessel shall not engage in any unlawful trade, nor in any way violate the revenue laws of the United States, and shall comply with the laws in all other respects.

SEC. 2. *And be it further enacted*, That all such vessels shall, in all respects, except as above, be subject to the laws of the United States, and shall be liable to seizure and forfeiture for any violation of the provisions of this act.

SEC. 3. *And be it further enacted*, That all such licensed yachts shall use a signal of the form, size, and colors prescribed by the secretary of the navy, and the owners thereof shall at all times permit the naval architects in the employ of the United States to examine and copy the models of said yachts.

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ACT OF 1849, CHAPTER 105 (9 U. S. Stats. at Large, 382).

*Regulations to be observed by Vessels, Steamboats, &c. navigating the Northern or Northwestern Lakes.*

SECTION 5. *And be it further enacted*, That vessels, steamboats, and propellers, navigating the northern and western lakes, shall, from and after the thirtieth day of April next, comply with the following regulations, for the security of life and property, to wit: during the night, vessels on the star-

board tack shall show a red light, vessels on the larboard tack a green light, and vessels going off large, or before the wind, or at anchor, a white light; steamboats and propellers shall carry on the stem, or as far forward as possible, a triangular light, at an angle of about sixty degrees with the horizon, and on the starboard side a light shaded green, and on the larboard side red; said lights shall be furnished with reflectors, &c. complete, and of a size to insure a good and sufficient light; and if loss or damage shall occur, the owner or owners of the vessel, steamboat, or propeller, neglecting to comply with these regulations, shall be liable to the injured party for all loss or damage resulting from such neglect; and the owner or owners of any vessel failing to comply with said regulations shall forfeit a penalty of one hundred dollars, which may be recovered in an action of debt, to be brought by the district attorney of the United States, in the name of the United States, in any court of competent jurisdiction.<sup>1</sup>

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ACT OF 1850, CHAPTER 27 (9 U. S. Stats. at Large, 440).

*An Act to provide for recording the Conveyances of Vessels, and for other Purposes.*<sup>2</sup>

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no bill of sale, mortgage, hypothecation, or conveyance of any vessel, or part of any vessel, of the United States, shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof; unless such bill of sale, mortgage, hypothecation, or conveyance be recorded in the office of the collector of the customs where such vessel is registered or enrolled: *Provided,* That the lien by bottomry on any vessel created during her voyage, by a loan of money or materials, necessary to repair or enable such vessel to prosecute a voyage, shall not lose its priority, or be in any way affected by the provisions of this act.

SEC. 2. *And be it further enacted,* That the collectors of the customs shall record all such bills of sale, mortgages, hypothecations, or conveyances, and, also, all certificates for discharging and cancelling any such conveyances in a book or books to be kept for that purpose, in the order of their reception; noting in said book or books, and also on the bill of sale, mortgage, hypothecation, or conveyance, the time when the same was received, and shall certify on the bill of sale, mortgage, hypothecation, or conveyance, or certificate of discharge or cancellation, the number of the book and page where recorded; and shall receive, for so recording such instrument of conveyance, or certificate of discharge, fifty cents.

SEC. 3. *And be it further enacted,* That the collectors of the customs shall

<sup>1</sup> See Act of 1864, c. 69.

<sup>2</sup> See Act of 1866, c. 8.

keep an index of such records, inserting alphabetically the names of the vendor or mortgagor, and of the vendee or mortgagee, and shall permit said index and books of records to be inspected during office hours, under such reasonable regulations as they may establish, and shall, when required, furnish to any person a certificate, setting forth the names of the owners of any vessel registered or enrolled, the parts or proportions owned by each (if inserted in the register or enrolment), and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance upon such vessel, recorded since the issuing of the last register or enrolment; viz. the date, amount of such incumbrance, and from and to whom or in whose favor made; the collector shall receive for each such certificate one dollar.

SEC. 4. *And be it further enacted*, That the collectors of the customs shall furnish certified copies of such records on the receipt of fifty cents for each bill of sale, mortgage, or other conveyance.

SEC. 5. *And be it further enacted*, That the owner, or agent of the owner of any vessel of the United States, applying to a collector of the customs for a register or enrolment of a vessel, shall, in addition to the oath now prescribed by law, set forth, in the oath of ownership, the part or proportion of such vessel belonging to each owner, and the same shall be inserted in the register or enrolment; and that all bills of sale of vessels registered or enrolled shall set forth the part of the vessel owned by each person selling, and the part conveyed to each person purchasing.

SEC. 6. *And be it further enacted*, That the twelfth clause or section of the act entitled "An act in addition to the several acts regulating the shipment and discharge of seamen, and the duties of consuls," approved July twentieth, eighteen hundred and forty, be so amended, as that all complaints in writing to the consuls or commercial agents as therein provided, that a vessel is unseaworthy, shall be signed by the first, or the second and third officers, and a majority of the crew, before the consul or commercial agent shall be authorized to notice such complaint, or proceed to appoint inspectors as therein provided.

SEC. 7. *And be it further enacted*, That any person, not being an owner, who shall, on the high seas, wilfully, with intent to burn or destroy, set fire to any ship or other vessel, or otherwise attempt the destruction of such ship or other vessel, being the property of any citizen or citizens of the United States, or procure the same to be done, with the intent aforesaid, and being thereof lawfully convicted, shall suffer imprisonment to hard labor, for a term not exceeding ten years, nor less than three years, according to the aggravation of the offence.

SEC. 8. *And be it further enacted*, That this act shall be in force from and after the first day of October next ensuing.



## ACT OF 1850, CHAPTER 80 (9 U. S. Stats. at Large, 514).

*An Act making Appropriations for the Naval Service for the Year ending the thirtieth of June, one thousand eight hundred and fifty-one, and abolishing Flogging in the Navy and on board Vessels of Commerce.*

For transportation of the United States mail between New York and Liverpool, between New York and New Orleans, Havana and Chagres, and between Panama and some points in the Territory of Oregon, eight hundred and seventy-four thousand six hundred dollars: *Provided*, That no payment shall be made for said services, except in proportion to the mail service heretofore performed, or that may be hereafter performed; and that the secretary of the navy is hereby directed to make payment in said proportion only: *Provided*, That flogging in the navy, and on board vessels of commerce, be, and the same is hereby, abolished from and after the passage of this act.

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## ACT OF 1851, CHAPTER 43 (9 U. S. Stats. at Large, 635).

*An Act to limit the Liability of Ship-Owners, and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no owner or owners of any ship or vessel shall be subject or liable to answer for or make good to any one or more person or persons any loss or damage which may happen to any goods or merchandise whatsoever, which shall be shipped, taken in, or put on board any such ship or vessel, by reason or by means of any fire happening to or on board the said ship or vessel, unless such fire is caused by the design or neglect of such owner or owners: *Provided*, That nothing in this act contained shall prevent the parties from making such contract as they please, extending or limiting the liability of ship-owners.

SEC. 2. *And be it further enacted*, That if any shipper or shippers of platina, gold, gold dust, silver, bullion, or other precious metals, coins, jewelry, bills of any bank or public body, diamonds or other precious stones, shall lade the same on board of any ship or vessel, without, at the time of such lading, giving to the master, agent, owner, or owners of the ship or vessel receiving the same, a note in writing of the true character and value thereof, and have the same entered on the bill of lading therefor, the master and owner or owners of the said vessel shall not be liable, as carriers thereof, in any form or manner. Nor shall any such master or owners be liable for any such valuable goods beyond the value and according to the character thereof so notified and entered.

SEC. 3. *And be it further enacted*, That the liability of the owner or

owners of any ship or vessel, for any embezzlement, loss, or destruction, by the master, officers, mariners, passengers, or any other person or persons, of any property, goods, or merchandise, shipped or put on board of such ship or vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner or owners respectively, in such ship or vessel, and her freight then pending.

SEC. 4. *And be it further enacted*, That if any such embezzlement, loss, or destruction, shall be suffered by several freighters or owners of goods, wares, or merchandise, or any property whatever, on the same voyage, and the whole value of the ship or vessel, and her freight for the voyage, shall not be sufficient to make compensation to each of them, they shall receive compensation from the owner or owners of the ship or vessel, in proportion to their respective losses; and for that purpose the said freighters and owners of the property, and the owner or owners of the ship or vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner or owners of the ship or vessel may be liable amongst the parties entitled thereto. And it shall be deemed a sufficient compliance with the requirements of this act, on the part of such owner or owners, if he or they shall transfer his or their interest in such vessel and freight, for the benefit of such claimants, to a trustee, to be appointed by any court of competent jurisdiction, to act as such trustee for the person or persons who may prove to be legally entitled thereto, from and after which transfer, all claims and proceedings against the owner or owners shall cease.

SEC. 5. *And be it further enacted*, That the charterer or charterers of any ship or vessel, in case he or they shall man, victual, and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.

SEC. 6. *And be it further enacted*, That nothing in the preceding sections shall be construed to take away or effect the remedy to which any party may be entitled, against the master, officers, or mariners, for or on account of any embezzlement, injury, loss, or destruction of goods, wares, merchandise, or other property, put on board any ship or vessel, or on account of any negligence, fraud, or other malversation of such master, officers, or mariners, respectively, nor shall anything herein contained lessen

or take away any responsibility to which any master or mariner of any ship or vessel may now by law be liable, notwithstanding such master or mariner may be an owner or part owner of the ship or vessel.

SEC. 7. *And be it further enacted,* That any person or persons shipping oil of vitriol, unslacked lime, inflammable matches, or gunpowder, in a ship or vessel taking cargo for divers persons on freight, without delivering, at the time of shipment, a note in writing, expressing the nature and character of such merchandise, to the master, mate, officer, or person in charge of the lading of the ship or vessel, shall forfeit to the United States one thousand dollars.

This act shall not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever, used in rivers or inland navigation.

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ACT OF 1852, CHAPTER 106 (10 U. S. Stats. at Large, 61).

*An Act to amend an Act entitled "An Act to provide for the better Security of the Lives of Passengers on board of Vessels propelled in whole or in part by Steam," and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no license, register, or enrolment, under the provisions of this or the act to which this is an amendment, shall be granted, or other papers issued by any collector, to any vessel propelled in whole or in part by steam, and carrying passengers, until he shall have satisfactory evidence that all the provisions of this act have been fully complied with; and if any such vessel shall be navigated, with passengers on board, without complying with the terms of this act, the owners thereof and the vessel itself shall be subject to the penalties contained in the second section of the act to which this is an amendment.

SEC. 2. *And be it further enacted,* That it shall be the duty of the inspectors of the hulls of steamers, and the inspectors of boilers and engines, appointed under the provisions of this act, to examine and see that suitable and safe provisions are made throughout such vessel to guard against loss or danger from fire; and no license or other papers, on any application, shall be granted, if the provisions of this act for preventing fires are not complied with, or if any combustible material liable to take fire from heated iron, or any other heat generated on board of such vessels in and about the boilers, pipes, or machinery, shall be placed at less than eighteen inches distant from such heated metal or other substance likely to cause ignition, unless a column of air or water intervenes between such heated surface and any wood or other combustible material so exposed, sufficient at all times, and under all circumstances, to prevent ignition; and further,

when wood is so exposed to ignition, as an additional preventive, it shall be shielded by some incombustible material in such manner as to leave the air to circulate freely between such material and the wood : *Provided, however,* That when the structure of such steamers is such, or the arrangement of the boilers or machinery is such that the requirements aforesaid cannot, without serious inconvenience or sacrifice, be complied with, inspectors may vary therefrom, if in their judgment it can be done with safety.

SEC. 3. *And be it further enacted,* That every vessel so propelled by steam, and carrying passengers, shall have not less than three double-acting forcing pumps, with chamber at least four inches in diameter, two to be worked by hand and one by steam, if steam can be employed, otherwise by hand ; one whereof shall be placed near the stern, one near the stem, and one amidship ; each having a suitable, well-fitted hose, of at least two thirds the length of the vessel, kept at all times in perfect order and ready for immediate use ; each of which pumps shall also be supplied with water by a pipe connected therewith, and passing through the side of the vessel, so low as to be at all times in the water when she is afloat : *Provided, That,* in steamers not exceeding two hundred tons measurement, two of said pumps may be dispensed with ; and in steamers of over two hundred tons, and not exceeding five hundred tons measurement, one of said pumps may be dispensed with.

SEC. 4. *And be it further enacted,* That every such vessel, carrying passengers, shall have at least two good and suitable boats, supplied with oars, in good condition at all times for service, one of which boats shall be a life-boat made of metal, fire-proof, and in all respects a good, substantial, safe sea boat, capable of sustaining, inside and outside, fifty persons, with life-lines attached to the gunwale, at suitable distances. And every such vessel of more than five hundred tons, and not exceeding eight hundred tons measurement, shall have three life-boats ; and every such vessel of more than eight hundred tons, and not exceeding fifteen hundred tons measurement, shall have four life-boats ; and every such vessel of more than fifteen hundred tons measurement shall have six life-boats,—all of which boats shall be well furnished with oars and other necessary apparatus : *Provided, however,* The inspectors are hereby authorized to exempt steamers navigating rivers only from the obligation to carry, of the life-boats herein provided for, more than one, the same being of suitable dimensions, made of metal and furnished with all necessary apparatus for use and safety,—such steamers having other suitable provisions for the preservation of life in case of fire or other disaster.

SEC. 5. *And be it further enacted,* That every such vessel, carrying passengers, shall also be provided with a good life-preserver, made of suitable

material, or float well adapted to the purpose, for each and every passenger, which life-preservers and floats shall always be kept in convenient and accessible places in such vessel, and in readiness for the use of the passengers; and every such vessel shall also keep twenty fire buckets and five axes; and there shall be kept on board every such vessel exceeding five hundred tons measurement, buckets and axes after the rate of their tonnage, as follows: on every vessel of six hundred tons measurement, five buckets and one axe for each one hundred tons measurement, decreasing this proportion as the tonnage of the vessel increases, so that any such vessel of thirty-five hundred tons, and all such vessels exceeding the same, shall not be required to keep but three buckets for each one hundred tons of measurement, and but one axe for every five buckets.

SEC. 6. *And be it further enacted*, That every such vessel carrying passengers on the main or lower deck shall be provided with sufficient means convenient to such passengers for their escape to the upper deck in case of fire or other accident endangering life.

SEC. 7. *And be it further enacted*, That no loose hemp shall be carried on board any such vessel; nor shall baled hemp be carried on the deck or guards thereof, unless the bales are compactly pressed and well covered with bagging, or a similar fabric; nor shall gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids, or materials which ignite by friction, be carried on board any such vessel, as freight, except in cases of special license for that purpose, as hereinafter provided; and all such articles kept on board as stores, shall be secured in metallic vessels; and every person who shall knowingly violate any of the provisions of this section, shall pay a penalty of one hundred dollars for each offence, to be recovered by action of debt in any court of competent jurisdiction.

SEC. 8. *And be it further enacted*, That hereafter all gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids, and materials which ignite by friction, when packed or put up for shipment on board of any such vessel, shall be securely packed or put up separately from each other and from all other articles, and the package, box, cask, or vessel containing the same, shall be distinctly marked on the outside with the name or description of the articles contained therein; and every person who shall pack or put up, or cause to be packed or put up for shipment on board of any such vessel, any gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids, or materials which ignite by friction, otherwise than as aforesaid, or shall ship the same, unless packed and marked as aforesaid, on board of any steam-vessel carrying passengers, shall be deemed guilty of a misdemeanor, and punished by a fine not exceeding one thousand dollars, or imprisonment not exceeding eighteen months, or both.

SEC. 9. *And be it further enacted*, That instead of the existing provisions of law for the inspection of steamers and their equipment, and instead of the present system of pilotage of such vessels, and the present mode of employing engineers on board the same, the following regulations shall be observed, to wit: The collector or other chief officer of the customs, together with the supervising inspector for the district, and the judge of the district court of the United States for the district in each of the following collection districts, namely, New Orleans and St. Louis, on the Mississippi River; Louisville, Cincinnati, Wheeling,<sup>1</sup> and Pittsburg, on the Ohio River; Buffalo and Cleveland, on Lake Erie; Detroit, upon Detroit River; Nashville, upon the Cumberland River; Chicago, on Lake Michigan; Oswego, on Lake Ontario; Burlington, in Vermont; Galveston, in Texas; Mobile, in Alabama; Savannah, in Georgia; Charleston, in South Carolina; Norfolk, in Virginia; Baltimore, in Maryland; Philadelphia, in Pennsylvania; New York, in New York; New London, in Connecticut; Boston, in Massachusetts; Portland, in Maine; and San Francisco, in California, shall designate two inspectors, of good character and suitable qualifications to perform the services required of them by this act within the respective districts for which they shall be appointed, one of whom, from his practical knowledge of ship-building, and the uses of steam in navigation, shall be fully competent to make a reliable estimate of the strength, seaworthiness, and other qualities of the hulls of steamers and their equipment, deemed essential to safety of life, when such vessels are employed in the carriage of passengers, to be called the Inspector of Hulls; the other of whom, from his knowledge and experience of the duties of an engineer employed in navigating vessels by steam, and also in the construction and use of boilers, and the machinery and appurtenances therewith connected, shall be able to form a reliable opinion of the quality of the material, the strength, form, workmanship, and suitableness of such boilers and machinery to be employed in the carriage of passengers, without hazard to life, from imperfections in the material, workmanship, or arrangement of any part of such apparatus for steaming, to be called the Inspector of Boilers; and these two persons thus designated, if approved by the secretary of the treasury, shall be, from the time of such designation, inspectors, empowered and required to perform the duties herein specified, to wit:—

*First*, Upon application in writing by the master or owner, they shall, once in every year at least, carefully inspect the hull of each steamer belonging to their respective districts and employed in the carriage of passengers, and shall satisfy themselves that every such vessel so submitted to their inspection is of a structure suitable for the service in which she is to

<sup>1</sup> See Act of 1864, c. 118.

be employed, has suitable accommodations for her crew and passengers, and is in a condition to warrant the belief that she may be used in navigation as a steamer, with safety to life, and that all the requirements of law in regard to fires, boats, pumps, hose, life-preservers, floats, and other things, are faithfully complied with ; and if they deem it expedient, they may direct the vessel to be put in motion, and may adopt any other suitable means to test her sufficiency and that of her equipment.

*Second.* They shall also inspect the boilers of such steamers before the same shall be used, and once in every year thereafter, subjecting them to a hydrostatic pressure, the limit to which, not exceeding one hundred and sixty-five pounds to the square inch for high-pressure boilers, may be prescribed by the owner or the master, and shall satisfy themselves by examination and experimental trials, that the boilers are well made of good and suitable material ; that the openings for the passage of water and steam respectively, and all pipes and tubes exposed to heat, are of proper dimensions, and free from obstruction ; that the spaces between the flues are sufficient, and that the fire line of the furnace is below the prescribed water-line of the boilers ; and that such boilers and the machinery and the appurtenances may be safely employed in the service proposed in the written application, without peril to life ; and shall also satisfy themselves that the safety-valves are of suitable dimensions, sufficient in number, well arranged, and in good working order (one of which may, if necessary in the opinion of the inspectors, to secure safety, be taken wholly from the control of all persons engaged in navigating such vessel) ; that there is a suitable number of gauge-cocks properly inserted, and a suitable water-gauge and steam-gauge indicating the height of the water and the pressure of the steam ; that in or upon the outside flue of each outside high-pressure boiler, there is placed in a suitable manner alloyed metals, fusible by the heat of the boiler when raised to the highest working pressure allowed, and that in or upon the top of the flues of all other high-pressure boilers in the steamer, such alloyed metals are placed, as aforesaid, fusing at ten pounds greater pressure than said metals on the outside boilers, thereby, in each case, letting steam escape ; and that adequate and certain provision is made for an ample supply of water to feed the boilers at all times, whether such vessel is in motion or not ; so that, in high-pressure boilers, the water shall not be less than four inches above the flue : *Provided, however,* in steamers hereafter supplied with new high-pressure boilers, if the alloy fuses on the outer boilers at a pressure of ten pounds exceeding the working pressure allowed, and at twenty pounds above said pressure on the inner boilers, it shall be a sufficient compliance with this act.

*Third.* That in subjecting to the hydrostatic test aforesaid, boilers called and usually known under the designation of high-pressure boilers, the in-

spectors shall assume one hundred and ten pounds to the square inch as the maximum pressure allowable as a working power for a new boiler forty-two inches in diameter, made of inspected iron plates at least one fourth of an inch thick, in the best manner, and of the quality herein required, and shall rate the working power of all high-pressure boilers, whether of greater or less diameter, old or new, according to their strength compared with this standard; and in all cases the test applied shall exceed the working power allowed, in the ratio of one hundred and sixty-five to one hundred and ten, and no high-pressure boilers hereafter made shall be rated above this standard; and in subjecting to the test aforesaid that class of boilers usually designated and known as low-pressure boilers, the said inspectors shall allow as a working power of each new boiler a pressure of only three fourths the number of pounds to the square inch to which it shall have been subjected by the hydrostatic test and found to be sufficient therefor, using the water in such tests at a temperature not exceeding sixty degrees Fahrenheit; but should such inspectors be of the opinion that said boiler, by reason of its construction or material, will not safely allow so high a working pressure, they may, for reasons to be stated specifically in their certificate, fix the working pressure of said boiler at less than three fourths of said test pressure, and no low-pressure boiler hereafter made shall be rated in its working pressure above the aforesaid standard: and provided that the same rules shall be observed in regard to boilers heretofore made, unless the proportion between such boilers and the cylinders, or some other cause, renders it manifest that its application would be unjust, in which cases the inspectors may depart from these rules, if it can be done with safety; but in no case shall the working pressure allowed exceed the hydrostatic test, and no valve under any circumstances shall be loaded or so managed in any way as to subject a boiler to a greater pressure than the amount allowed by the inspectors, nor shall any boiler or pipe be approved which is made in whole or in part of bad material, or is unsafe in its form, or dangerous from defective workmanship, age, use, or any other cause.

*Fourth.* That when the inspection in detail is completed, and the inspectors approve of the vessel and her equipment throughout, they shall make and subscribe a certificate to the collector of the district, substantially as follows:—

|                   |  |  |
|-------------------|--|--|
| State of          | District of  | Application having been made in                                    |
| writing by        | to the subscribers, inspectors for said district, to ex-   |  |
| amine the steamer | of   | whereof  |
|                   |  | are owners, and  |
|                   | is master, we, having performed that service, now, on this |  |
| day of            | A. D.  | do certify, that she was built in the year                         |
|                   |  | , is in all respects staunch, seaworthy, and in good condition for |



navigation, having suitable means of escape in case of accident from the main to the upper deck, that she is provided with (here insert the number of state-rooms, the number of berths therein, the number of other permanent berths for cabin passengers, the number of berths for deck or other classes of passengers, the number of passengers of each class for whom she has suitable accommodations, and in case of steamers sailing to or from any European port, or to or from any port on the Atlantic or the Pacific, a distance of one thousand miles or upwards, the number of each she is permitted to carry, — and in case of a steamer sailing to any other port, a distance of five hundred miles or upwards, the number of deck passengers she is permitted to carry, also the number of boilers, and the form, dimensions, and material of which each boiler is made, the thickness of the metal, and when made — if made after this act takes effect, and of iron, whether they are such in all respects as the act requires, whether each boiler has been tried by hydrostatic test, the amount of pressure to the square inch in pounds applied to it, whether the amount allowed as the maximum working power was determined by the rule prescribed by this act, if not, the reason for a departure from it; also the number of safety-valves required, their capacity, the load prescribed for each valve, how many are left to the control of the persons navigating the vessel, whether one is withdrawn, and the manner of securing it against interference, also the number and dimensions of supply pipes, and whether they and the other means provided are sufficient at all times and under all circumstances, when in good order, to keep the water up four inches at least above the top of the flue; also the number and dimensions of the steam-pipes, the number and kind of engines, the dimensions of their cylinders, the number and capacity of the forcing-pumps, and how worked, the number and kind of gauge-cocks, water and steam gauges, where situate, and how secured; also the manner of using alloyed metals, and the pressure at which they are known by the inspectors to fuse; the equipments for the extinguishment of fires, including hose, fire-buckets, and axes; the provisions for saving life in case of accident, including boats, life-preservers, and substitutes therefore, where kept, and all other provisions made on board for the security of the lives of passengers). And we further certify that the equipment of the vessel throughout, including pipes, pumps, and other means to keep the water up to the point aforesaid, hose, boats, life-preservers, and other things, is in conformity with the provisions of law; and that we declare it to be our deliberate conviction, founded upon the inspection which we have made, that the vessel may be employed as a steamer upon the waters named in the application, without peril to life, from any imperfection of form, materials, workmanship, or arrangement of the several parts, or from age or use. And we further certify that said vessel is to

run within the following limits, to wit : from                      to                      and back, touching at intermediate places.

And which certificate shall be verified by the oaths of the inspectors signing it, before a person competent by law to administer oaths. And in case the said inspectors do not grant a certificate of approval, they shall state, in writing, and sign the same, their reasons for their disapproval.

*Fifth.* Upon the application of the master or owner of any steamer employed in the carriage of passengers, for a license to carry gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids, and materials which ignite by friction, or either of them, the inspectors shall examine such vessel, and if they find that she is provided with chests or safes composed of metal, or entirely lined therewith, or one or more apartments thoroughly lined with metal at a secure distance from any fire, they may grant a certificate to that effect, authorizing such vessel to carry as freight any of the articles aforesaid, those of each description to be secured in such chest, safe, or apartment, containing no other article, and carried at a distance from any fire to be specified in the certificate: *Provided*, That any such certificate may be revoked or annulled at any time by the inspectors, upon proof that either of the said articles have been carried on board said vessel, at a place or in a manner not authorized by such certificate, or that any of the provisions of this act in relation thereto have been violated.

*Sixth.* The said inspectors shall keep a regular record of certificates of inspections of vessels, their boilers, engines, and machinery, whether of approval or disapproval, and when recorded, the original shall be delivered to the collector of the district ; they shall keep a like record of certificates, authorizing gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids and materials which ignite by friction, or either of them, to be carried as freight, by any such vessel ; and when recorded, deliver the originals to said collector ; they shall keep a like record of all licenses to pilots and engineers, and all revocations thereof, and shall from time to time report to the supervising inspector of their respective districts, in writing, their decisions on all applications for such licenses, or proceedings for the revocation thereof, and all testimony received by them in such proceedings.

*Seventh.* The inspectors shall license and classify all engineers and pilots of steamers carrying passengers.

*Eighth.* Whenever any person claiming to be qualified to perform the duty of engineer upon steamers carrying passengers shall apply for a certificate, the board of inspectors shall examine the applicant, and the proofs which he produces in support of his claim ; and if, upon full consideration, they are satisfied that his character, habits of life, knowledge, and experi-

ence in the duties of an engineer, are all such as to authorize the belief that the applicant is a suitable and safe person to be intrusted with the powers and duties of such a station, they shall give him a certificate to that effect, for one year, signed by them, in which certificate they shall state the time of the examination, and shall assign the appointee to the appropriate class of engineers.

*Ninth.* Whenever any person claiming to be a skilful pilot for any such vessel shall offer himself for a license, the said board shall make diligent inquiry as to his character and merits ; and if satisfied that he possesses the requisite skill, and is trustworthy and faithful, they shall give him a certificate to that effect, licensing him for one year to be a pilot of any such vessel within the limit prescribed in the certificate ; but the license of any such engineer or pilot may be revoked upon proof of negligence, unskilfulness, or inattention to the duties of the station : *Provided, however,* If in cases of refusal to license engineers or pilots, and in cases of the revocation of any license by the local board of inspectors, any engineer or pilot deeming himself wronged by such refusal or revocation, may, within thirty days after notice thereof, on application to a supervising inspector, have his case examined anew by such supervising inspector, upon producing a certified copy of the reasons assigned by the local board for their doings in the premises ; and such supervising inspector may revoke the decision of such local board of inspectors, and license such pilot or engineer ; and like proceedings, upon the same conditions, may be had by the master or owner of any such vessel, or of any steamboat-boiler, for which the said local board shall have refused, upon inspection, to give a certificate of approval, or shall have notified such master or owner of any repairs necessary after such certificate has been granted.

*Tenth.* It shall be unlawful for any person to employ, or any person to serve as engineer or pilot, on any such vessel, who is not licensed by the inspectors ; and any one so offending shall forfeit one hundred dollars for each offence : *Provided, however,* That if a vessel leaves her port with a complement of engineers and pilots, and on her voyage is deprived of their services, or the services of any of them, without the consent, fault, or collusion of the master, owner, or any one interested in the vessel, the deficiency may be temporarily supplied, until others, licensed, can be obtained.

*Eleventh.* In addition to the annual inspection, it shall be the duty of said board to examine, seasonably, steamers arriving and departing, so often as to enable them to detect any neglect to comply with the requirements of law, and also any defects or imperfections becoming apparent after the inspection aforesaid, and tending to render the navigation of the vessel unsafe, which service may be performed by one of the board ; and

if he shall discover an omission to comply with the law or that repairs have become necessary to make the vessel safe, he shall at once notify the master, stating in the notice what is required ; and if the master deems the requirements unreasonable or unnecessary, he may take the opinion of the board thereon, and if dissatisfied with the decision of such board, may apply for a re-examination of the case to the supervising inspector as is hereinbefore provided ; and if he shall refuse or neglect to comply with the requirements of the local board, and shall, contrary thereto, and while the same remains unreversed by the supervising inspector, employ the vessel by navigating her, the master and owner shall be liable for any damage to the passengers and their baggage which shall occur from any defects so as aforesaid stated in said notice, which shall be in writing, and all inspections and orders shall be promptly made by the inspectors ; and where it can be safely done in their judgment, they shall permit repairs to be made where those interested can most conveniently do them ; and no inspectors of one district shall modify or annul the doings of the inspectors of another district, in regard to repairs, unless there is a change in the state of things demanding more repairs than were thought necessary when the order was made ; nor shall the inspectors of one district appoint a person coming from another, if such person had been rejected for unfitness or want of qualifications.

*Twelfth.* The said board, when thereto requested, shall inspect steamers belonging to districts where no such board is established ; and if a certificate of approval is not granted, no other inspection shall be made by the same or any other board, until the objections made by the inspectors are removed ; and if any vessel shall be navigated after a board of inspectors have refused to make the collector a certificate of approval, she shall be liable to the same penalties as if she had been run without a license : *Provided, however,* That nothing herein contained shall impair the right of the inspectors to permit such vessel to go to another port for repairs, if, in their opinion, it is safe so to do.

*Thirteenth.* The said board of inspectors shall have power to summon before them witnesses, and to compel their attendance by the same process as in courts of law ; and after reasonable time given to the alleged delinquent, at the time and place of investigation, to examine said witnesses under oath, touching the performance of their duties by engineers and pilots of any such vessel ; and if it shall appear satisfactorily that any such engineer or pilot is incompetent, or that life has been placed in peril by reason of such incompetency, or by negligence or misconduct on the part of any such person, the board shall immediately suspend or revoke his license, and report their doings to the chief officer of the customs ; and the said chief officer of the customs shall pay out of the revenues

herein provided such sums to any witness so summoned under the provisions of this act, for his actual travel and attendance, as shall be officially certified, by an inspector hearing the case, upon the back of the summons, not exceeding the rates allowed to a witness for travel and attendance in the circuit and district courts of the United States.

*Fourteenth.* That the said board shall report promptly all their doings to the chief officer of the customs, as well as all omissions or refusals to comply with the provisions of law on the part of any owner or master of any such vessel, propelled in whole or in part by steam, carrying passengers.

*Fifteenth.* That it shall at all times be the duty of all engineers and pilots licensed under this act, and all mates, to assist the inspectors in the examination of any such vessels to which any such engineer, mate, or pilot belongs, and to point out all defects and imperfections in the hull or apparatus for steaming, and also to make known to them at the earliest opportunity, all accidents occasioning serious injury to the vessel or her equipment, whereby life may be in danger, and in default thereof the license of any such engineer or pilot shall be revoked.

SEC. 10. *And be it further enacted,* That in those cases where the number of passengers is limited by the inspector's certificate, it shall not be lawful to take on board of any steamer a greater number of passengers than is certified by the inspectors in the certificate; and the master and owners, or either of them, shall be liable, to any person suing for the same, to forfeit the amount of passage money and ten dollars for each passenger beyond the number allowed. And moreover, in all cases of an express or implied undertaking to transport passengers, or to supply them with food and lodging, from place to place, and suitable provision is not made of a full and adequate supply of good and wholesome food and water, and of suitable lodging for all such passengers, or where barges, or other craft, impeding the progress, are taken in tow, for a distance exceeding five hundred miles, without previous and seasonable notice to such passengers, in all such cases the owners and the vessel shall be liable to refund all the money paid for the passage, and to pay also the damage sustained by such default or delay: *Provided, however,* That if in any such case a satisfactory bond is given to the marshal for the benefit of the plaintiff, to secure the satisfaction of such judgment as he may recover, the vessel shall be released.

SEC. 11. *And be it further enacted,* That if the master of a steamer, or any other person, whether acting under orders or not, shall intentionally load or obstruct, or cause to be loaded or obstructed, in any way or manner, the safety valve or valves of a boiler, or shall employ any other means or device whereby the boiler shall be subjected to a greater pressure than the amount allowed by the certificate of the inspectors, or shall be exposed to a greater pressure,

or shall intentionally derange or hinder the operation of any machinery or device employed to denote the state of the water or steam in any boiler, or to give warning of approaching danger, it shall, in any such case, be a misdemeanor, and any and every person concerned therein, directly or indirectly, shall forfeit two hundred dollars, and may, at the discretion of the court, be in addition thereto imprisoned not exceeding eighteen months.

SEC. 12. *And be it further enacted*, That if at any time there be a deficiency of water in a boiler, by suffering it to fall below three inches above the flue, as prescribed in this act, unless the same happens through inevitable accident, the master, if it be by his order, assent, or connivance, and also the engineer, or other person, whose duty it is to keep up the supply, shall be guilty of an offence for which they shall severally be fined one hundred dollars each; and if an explosion or collapse happens in consequence of such deficiency, they, or any of them, may be further punished by imprisonment, for a period of not less than six nor more than eighteen months.

SEC. 13. *And be it further enacted*, That hereafter all boilers of steam-boats made of iron shall be constructed of plates which have been stamped according to the provisions of this act.

SEC. 14. *And be it further enacted*, That it shall be the duty of such inspectors to ascertain the quality of the material of which the boiler-plates of any such boiler so submitted to their inspection are made; and to satisfy themselves by any suitable means, whether the mode of manufacturing has been such as to produce iron equal to good iron made with charcoal, such as in their judgment may be used for generating steam-power without hazard to life; and no such boiler shall be approved which is made of unsuitable material, or of which the manufacture is imperfect, or is not, in their opinion, of suitable strength, or whose plates are less than one fourth of an inch in thickness, for a high-pressure boiler of forty-two inches in diameter, and in that proportion of strength according to the maximum of working pressure allowed for high-pressure boilers of greater or less diameter, or which is made of any but wrought iron of a quality equal to good iron made with charcoal.

SEC. 15. *And be it further enacted*, That all plates of boiler iron shall be distinctly and permanently stamped in such manner as the secretary of the treasury shall prescribe, and if practicable, in such place or places that the mark shall be left visible after the plates are worked into boilers; with the name of the manufacturer, the quality of the iron, and whether or not hammered, and the place where the same is manufactured.

SEC. 16. *And be it further enacted*, That it shall be unlawful to use in such vessels for generating steam for power a boiler, or steam-pipe connecting the boilers, made after the passage of this act, of any iron unless it has been stamped by the manufacturer, as herein provided; and if any person shall make for use in any such vessel a boiler of iron not so stamped, intended to generate

steam for power, he shall, for any such offence, forfeit five hundred dollars, to be recovered in an action of debt by any person suing for the same; and any person using or causing to be used in any such vessel such a boiler to generate steam for power shall forfeit a like sum for each offence.

SEC. 17. *And be it further enacted*, That if any person shall counterfeit the marks and stamps required by this act, or shall falsely stamp any boiler iron, and be convicted thereof, he shall be fined not exceeding five hundred dollars and imprisoned not exceeding two years. And if any person or persons shall stamp or mark plates with the name or marks of another with intent to mislead, deceive, or defraud, such person or persons shall be liable to any one injured thereby for all damage occasioned by such fraud or deception.

SEC. 18. *And be it further enacted*, That in order to carry this act fully into execution, the President of the United States shall, with the advice of the Senate, appoint nine supervising inspectors, who shall be selected for their knowledge, skill, and experience in the uses of steam for navigation, and who are competent judges, not only of the character of vessels, but of all parts of the machinery employed in steaming, who shall assemble together at such places as they may agree upon once in each year at least, for joint consultation and the establishment of rules and regulations for their own conduct and that of the several boards of inspectors within the districts, and also to assign to each of the said nine inspectors the limits of territory within which he shall perform his duties. And the said supervising inspectors shall each be paid for his services after the rate of fifteen hundred dollars a year, and in addition thereto, his actual reasonable travelling expenses, incurred in the necessary performance of his duty when away from the principal port in his district, and certified and sworn to by him under such instructions as shall be given by the secretary of the treasury, who is hereby authorized to pay such salaries, and also such travelling expenses, and the actual reasonable expenses (both to them and other inspectors) of transporting from place to place the instruments used in inspections, which expenses shall be proved to his satisfaction.

SEC. 19. *And be it further enacted*, That the supervising inspectors shall watch over all parts of the territory assigned them, shall visit, confer with, and examine into the doings of the several boards of inspectors, and shall, whenever they think it expedient, visit such vessels, licensed, and examine into their condition, for the purpose of ascertaining whether the provisions of this act have been observed and complied with, both by the board of inspectors and the master and owners; and it shall be the duty of all masters, engineers, and pilots of such vessels to answer all reasonable inquiries, and to give all the information in their power, in regard to any such vessel so visited, and her machinery for steaming, and the manner of managing both.

SEC. 20. *And be it further enacted*, That whenever a supervising inspector ascertains to his satisfaction that the master, engineer, pilot, or owner of any such vessel fail to perform their duties according to the provisions of this act, he shall report the facts in writing to the board in the district where the vessel belongs, and, if need be, cause the negligent or offending parties to be prosecuted; and if he has good reason to believe there has been, through negligence, or from any other cause, a failure of the board who inspected the vessel to do its duty, he shall report the facts in writing to the secretary of the treasury, who shall cause immediate investigation into the truth of the complaint, and if he deems the cause sufficient, shall remove the delinquent.

SEC. 21. *And be it further enacted*, That it shall be the duty of such supervising inspectors to see that the said several boards within their respective collection districts execute their duties faithfully, promptly, and, as far as possible, uniformly, in all places, by following out the provisions of this act, according to the true intent and meaning thereof; and they shall, as far as practicable by their established rules, harmonize differences of opinion when they exist in different boards.

SEC. 22. *And be it further enacted*, That the said supervising inspectors shall also visit collection districts in which there are no boards of inspectors, if there be any where steamers are owned or employed, and each one shall have full power to inspect any such steamer or boilers of each steamer in any such district, or in any other district where, from distance or other cause, it is inconvenient to resort to the local board, and to grant certificates of approval according to the provisions of this act, and to do and perform in such districts all the duties imposed upon boards in the districts where they exist: *Provided*, That no supervising or other inspector shall be deemed competent to inspect in any case where he is directly or indirectly personally interested, or is associated in business with any person who is so interested, but in all such cases the duty shall be performed by disinterested inspectors; and inspection made in violation of this rule shall be void and of no effect.

SEC. 23. *And be it further enacted*, That it shall be the duty of each of the collectors or other chief officer of the customs for the districts aforesaid, except San Francisco, to make known without delay, to the collectors of all the said districts, except San Francisco, the names of all persons licensed as engineers or pilots for such vessels, and the names of all persons from whom upon application, licenses have been withheld, and the names of all whose licenses have been revoked or suspended, and also the names of all such vessels which neglect or refuse to make such repairs as may be ordered under the provisions of this act, and the names of all for which license has been, on application, refused.



SEC. 24. *And be it further enacted*, That it shall be the duty of the collectors or other chief officers of the customs and of the inspectors aforesaid, within the said several districts, to enforce the provisions of law against all such steamers arriving and departing ; and upon proof that any collector or other chief officer of the customs, or inspector, has negligently or intentionally omitted his duty in this particular, such delinquent shall be removed from office, and shall also be subject to a penalty of one hundred dollars for each offence, to be sued for in an action of debt before any court of competent jurisdiction.

SEC. 25. *And be it further enacted*, That the collector, or other chief officer of the customs, shall retain on file all original certificates of the inspectors required by this act to be delivered to him, and shall give to the master or owner of the vessel therein named, two certified copies thereof, one of which shall be placed by such master or owner in some conspicuous place in the vessel, where it will be most likely to be observed by passengers and others, and there kept at all times ; the other shall be retained by such master or owner as evidence of the authority thereby conferred ; and if any person shall receive or carry any passenger on board any such steamer not having a certified copy of the certificate of approval as required by this act, placed and kept as aforesaid ; or who shall receive or carry any gunpowder, oil of turpentine, oil of vitriol, camphene, or other explosive burning fluids, or materials which ignite by friction, as freight, on board any steamer carrying passengers, not having a certificate authorizing the same, and a certified copy thereof placed and kept as aforesaid ; or who shall stow or carry any of said articles, at a place or in a manner not authorized by such certificate, shall forfeit and pay for each offence one hundred dollars, to be recovered by action of debt in any court of competent jurisdiction.

SEC. 26. *And be it further enacted*, That every inspector who shall wilfully certify falsely touching any such vessel propelled in whole or in part by steam, and carrying passengers, her hull, accommodations, boilers, engines, machinery, or their appurtenances, or any of her equipments, or any matter or thing contained in any certificate signed and sworn to by him, shall, on conviction thereof, be punished by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both.

SEC. 27. *And be it further enacted*, That if any such vessel carrying passengers, having a license and certificate, as required by this act, shall be navigated without having her hull, accommodations, boilers, engines, machinery, and their appurtenances, and all equipments, in all things conformable to such certificate, the master or commander by whom she shall be so navigated, having knowledge of such defect, shall be punished by fine not exceeding one hundred dollars, or imprisonment not exceeding two months, or both : *Provided*, That such master or commander shall not be liable for loss or de-

iciency occasioned by the dangers of navigation, if such loss or deficiency shall be supplied as soon as practicable.

SEC. 28. *And be it further enacted*, That on any such steamers navigating rivers only, when from darkness, fog, or other cause, the pilot on watch shall be of opinion that the navigation is unsafe, or, from accident to, or derangement of, the machinery of the boat, the engineer on watch shall be of opinion that the further navigation of the vessel is unsafe, the vessel shall be brought to anchor, or moored, as soon as it prudently can be done: *Provided*, That if the person in command shall, after being so admonished by either of such officers, elect to pursue such voyage, he may do the same; but in such case both he and the owners of such steamer shall be answerable for all damages which shall arise to the person of any passenger and his baggage from said causes in so pursuing the voyage, and no degree of care or diligence shall in such case be held to justify or excuse the person in command, or said owners.

SEC. 29. *And be it further enacted*, That it shall be the duty of the supervising inspectors to establish such rules and regulations to be observed by all such vessels in passing each other, as they shall from time to time deem necessary for safety; two printed copies of which rules and regulations, signed by said inspectors, shall be furnished to each of such vessels, and shall at all times be kept up in conspicuous places on such vessels, which rules shall be observed both night and day. Should any pilot, engineer, or master of any such vessel neglect or wilfully refuse to observe the foregoing regulations, any delinquent so neglecting or refusing shall be liable to a penalty of thirty dollars, and to all damage done to any passenger, in his person or baggage, by such neglect or refusal; and no such vessel shall be justified in coming into collision with another, if it can be avoided.

SEC. 30. *And be it further enacted*, That whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel, shall be liable to each and every person so injured, to the full amount of damage, if it happens through any neglect to comply with the provisions of law herein prescribed, or through known defects or imperfections of the steaming apparatus, or of the hull; and any person sustaining loss or injury through the carelessness, negligence, or wilful misconduct of an engineer or pilot, or their neglect or refusal to obey the provisions of law herein prescribed as to navigating such steamers, may sue such engineer or pilot, and recover damages for any such injury caused as aforesaid by any such engineer or pilot.

SEC. 31. *And be it further enacted*, That before issuing the annual license to any such steamer, the collector or other chief officer of the customs for the port or district shall demand and receive from the owner or owners of the steamer, as a compensation for the inspections and examinations made for the year, the following sums, in addition to the fees for issuing enrolments

and licenses, now allowed by law, according to the tonnage of the vessel, to wit : for each vessel of a thousand tons and over, thirty-five dollars ; for each of five hundred tons and over, but less than one thousand tons, thirty dollars ; and for each under five hundred tons and over one hundred and twenty-five tons, twenty-five dollars ; and for each under one hundred and twenty-five tons, twenty dollars, at the time of obtaining registry, and once in each year thereafter, pay, according to the rate of tonnage before mentioned, the sum of money herein fixed. And each engineer and pilot licensed as herein provided shall pay for the first certificate granted by any inspector or inspectors the sum of five dollars, and for each subsequent certificate one dollar, to such inspector or inspectors, to be accounted for and paid over to the collector or other chief officer of the customs ; and the sums derived from all the sources above specified shall be quarterly accounted for and paid over to the United States in the same manner as other revenue.

SEC. 32. *And be it further enacted*, That each inspector shall keep an accurate account of every such steamer boarded by him during the year, and of all his official acts and doings, which in the form of a report he shall communicate to the collector or other chief officer of the customs, on the first days of May and November, in each year.

SEC. 33. *And be it further enacted*, That the inspectors in the following districts shall each be allowed, annually, the following compensation, to be paid under the direction of the secretary of the treasury, in the manner officers of the revenue are paid, to wit :

For the district of Portland, in Maine, three hundred dollars.

For the district of Boston and Charlestown, in Massachusetts, eight hundred dollars.

For the district of New London, in Connecticut, three hundred dollars.

For the district of New York, two thousand dollars.

For the district of Philadelphia, in Pennsylvania, one thousand dollars.

For the district of Baltimore, in Maryland, one thousand dollars.

For the district of Norfolk, in Virginia, three hundred dollars.

For the district of Charleston, in South Carolina, four hundred dollars.

For the district of Savannah, in Georgia, four hundred dollars.

For the district of Mobile, in Alabama, one thousand dollars.

For the district of New Orleans, or in which New Orleans is the port of entry, in Louisiana, two thousand dollars.

For the district of Galveston, in Texas, three hundred dollars.

For the district of St. Louis, in Missouri, fifteen hundred dollars.

For the district of Nashville, in Tennessee, four hundred dollars.

For the district of Louisville, in Kentucky, twelve hundred dollars.

For the district of Cincinnati, Ohio, fifteen hundred dollars.

For the district of Wheeling, Virginia, five hundred dollars.

For the district of Pittsburg, Pennsylvania, fifteen hundred dollars.

For the district of Chicago, Illinois, five hundred dollars.

For the district of Detroit, Michigan, eight hundred dollars.

For the district of Cleveland, Ohio, five hundred dollars.

For the district of Buffalo, New York, twelve hundred dollars.

For the district of Oswego, or of which Oswego is the port of entry, New York, three hundred dollars.

For the district of Vermont, two hundred dollars.

For the district of San Francisco, California, fifteen hundred dollars.

SEC. 34. *And be it further enacted*, That the secretary of the treasury shall provide the inspectors with a suitable number of instruments, of uniform construction, so as to give uniform results to test the strength of boilers.

SEC. 35. *And be it further enacted*, That it shall be the duty of the master of any such steamer to cause to be kept a correct list of all the passengers received and delivered from day to day, noting the places where received and where landed, which record shall be open to the inspection of the inspectors and officers of the customs at all times; and in case of default, through negligence or design, the said master shall forfeit one hundred dollars, which penalty, as well as that for excess of passengers, shall be a lien upon the vessel: *Provided*, however, a bond may, as provided for in other cases, be given to secure the satisfaction of the judgment.

SEC. 36. *And be it further enacted*, That every master or commander of any such steamer shall keep on board of such steamer at least two copies of this act to be furnished to him by the secretary of the treasury; and if the master or commander neglects or refuses so to do, or shall unreasonably refuse to exhibit a copy of the same to any passenger who shall ask it, he shall forfeit twenty dollars.

SEC. 37. *And be it further enacted*, That any inspector who shall, upon any pretence, receive any fee or reward for his services rendered under this act, except what is herein allowed to him, shall forfeit his office; and if found guilty, on indictment, be otherwise punished according to the aggravation of the offence, by fine not exceeding five hundred dollars, or imprisonment not exceeding six months, or both.

SEC. 38. *And be it further enacted*, That all engineers and pilots of any such vessel shall, before entering upon their duties, make solemn oath before one of the inspectors herein provided for, to be recorded with the certificate, that he will faithfully and honestly, according to his best skill

and judgment, perform all the duties required of him by this act, without concealment or reservation; and if any such engineer, pilot, or any witness summoned under this act as a witness, shall, when under examination on oath, knowingly and intentionally falsify the truth, such person shall be deemed guilty of perjury, and, if convicted, be punished accordingly.

SEC. 39. *And be it further enacted*, That the supervising inspectors appointed under the provisions of this act, shall, within their respective districts, under the direction of the secretary of the treasury, take the examination, or receive the statements in writing of persons of practical knowledge and experience in the navigation of steam vessels, the construction and use of boilers, engines, machinery, and equipments, touching the form, material, and construction of engines and their appurtenances; the causes of the explosion of boilers and collapse of flues and the means of prevention; the kind and description of safety-valves, water and steam gauges or indicators; equipments for the extinguishment of fires, and for the preservation of life in case of accident, on board of such vessels, and all other means in use or proper to be adopted, for the better security of the lives of persons on board vessels propelled in whole or in part by steam; the advantages and disadvantages of the different descriptions of boilers, engines, and their appurtenances, safety-valves, water and steam gauges or indicators, equipments for the prevention or extinguishment of fires, and the preservation of life in case of accident, in use on board such vessels; whether any, and what further legislation is necessary or proper for the better security of the lives of persons on board such steam vessels; which examination and statements so taken and received shall be transmitted to the secretary of the treasury at such time as he shall prescribe.

SEC. 40. *And be it further enacted*, That it shall be the duty of the secretary of the treasury to cause such interrogatories to be prepared and published as in his opinion may be proper to elicit the information contemplated by the preceding section, and upon the receipt of the examination and statements taken by the inspectors shall report the same to Congress, together with the recommendation of such further provisions as he may deem proper to be made for the better security of the lives of persons on board steam vessels.

SEC. 41. *And be it further enacted*, That all penalties imposed by this act may be recovered in an action of debt by any person who will sue therefor in any court of the United States.

SEC. 42. *And be it further enacted*, That this act shall not apply to public vessels of the United States or vessels of other countries; nor to steamers used as ferry-boats, tug-boats, towing-boats, nor to steamers not

exceeding one hundred and fifty tons burden and used in whole or in part for navigating canals. The inspection and certificate required by this act shall in all cases of ocean steamers constructed under contract with the United States for the purpose, if desired, of being converted into war steamers, be made by a chief engineer of the navy to be detailed for that service by the secretary of the navy, and he shall report both to said secretary and to the supervising inspector of the district where he shall make any inspection.

SEC. 43. *And be it further enacted*, That all such parts of this act as authorize the appointment and qualification of inspectors, and the licensing of engineers and pilots, shall take effect upon the passage thereof, and that all other parts of this act shall go into effect at the times and places as follows: in the districts of New Orleans, St. Louis, Louisville, Cincinnati, Wheeling, Pittsburg, Nashville, Mobile, and Galveston, on the first day of January next, and in all other districts on the first day of March next.

SEC. 44. *And be it further enacted*, That all parts of laws heretofore made, which are suspended by or are inconsistent with this act, are hereby repealed.

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ACT OF 1852, CHAPTER 113 (10 U. S. Stats. at Large, 140).

*An Act to establish certain Post-Roads, and for other Purposes.*

SECTION 5. *And be it further enacted*, That no collector, or other officer of the customs, shall permit any ship or vessel, arriving within any port or collection district of the United States, to make entry or break bulk until all letters on board the same shall be delivered into the post-office at or nearest said port or place, nor until the captain or commander of such ship or vessel shall have signed and sworn to a declaration before such collector or officer of the customs, in the form and to the effect following; that is to say:—

“I, A. B., commander of the (state the name of the ship or vessel) arriving from (state the place), and now lying in the port of (state the name of the port), do, as required by law, solemnly swear (or affirm, as the case may be) that I have, to the best of my knowledge or belief, delivered, or caused to be delivered, into the post-office at or nearest said port, every letter and every bag, parcel, or package of letters that were on board the (state the name of the ship or vessel) during her last voyage, and that I have so delivered, or caused to be delivered, all such letters, bags, parcels, and packages as were in my possession or under my power or control.”

And the collector and every officer of the customs at every port, with-

out special instructions, and every special agent of the post-office department, when instructed by the postmaster-general to make examinations and seizures, shall carefully search every vessel for letters which may be on board, or have been carried or transported contrary to law; and each and every of such officers and agents, and every marshal of the United States and his deputies, shall at all times have power to seize all letters, and packages, and parcels, containing letters which shall have been sent or conveyed contrary to law on board any ship or vessel, or on or over any post-route of the United States, and to convey such letters to the nearest post-office; or may, if the postmaster-general and the secretary of the treasury shall so direct, detain the said letters, or any part thereof, until two months after the trial and final determination of all suits and proceedings which may at any time, within six months after such seizure, be brought against any person for sending, or carrying, or transporting any such letters contrary to any provisions of any act of Congress; and one half of any penalties that may be recovered for the illegal sending, carrying, or transportation of any such letters shall be paid to the officer so seizing, and the other half to the use of the post-office department; and every package or parcel so seized, in which any letter shall be concealed, shall be forfeited to the United States, and the same proceedings may be had to enforce such forfeiture as are authorized in respect to good[s], wares, and merchandise forfeited by reason of any violation of the revenue laws of the United States; and all laws for the benefit and protection of officers of the customs seizing goods, wares, or merchandise, for a violation of any revenue law of the United States, shall apply to the officers and agents making seizures by virtue of this act.

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ACT OF 1852, CHAPTER 4 (10 U. S. Stats. at Large, 149.)

*An Act authorizing the Secretary of the Treasury to issue Registers to Vessels in certain Cases.*<sup>1</sup>

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he hereby is, authorized to issue a register or enrolment for any vessel built in a foreign country, whenever such vessel may have been or shall hereafter be wrecked in the United States, and have been, or shall hereafter be, purchased and repaired by a citizen or citizens thereof: Provided, That it shall be proved to the satisfaction of the secretary of the treasury that the repairs put upon such vessel shall be equal to three fourths of the cost of said vessel when so repaired.*

<sup>1</sup> See Act of 1866, c. 213.

## ACT OF 1853, CHAPTER 80 (10 U. S. Stats. at Large, 168).

*Compensation to Seamen sent Home as Witnesses.*

There shall be paid to such seaman or other person as has been or shall be sent to the United States from any foreign port, station, sea, or ocean, by any United States minister, *chargé d'affaires*, consul, commander, or captain, to give testimony in any criminal case which has been or may be depending in any court of the United States, such compensation as the court which had or shall have cognizance of the crime, shall adjudge to be right and proper, not to exceed one dollar for each day the said seaman or person has been or shall be necessarily on the voyage, and arriving at the place of examination or trial, exclusive of sustenance and transportation; the court to take into consideration, in fixing said compensation, the condition of said seaman or witness; whether his voyage has been broken up, to his injury, by his being sent to the United States, or not.

If the said seaman or person has been or shall be transported in an armed vessel of the United States, no charge for sustenance or transportation shall be made; if in any other vessel, the court may adjudge what compensation shall be paid to the captain of said vessel, and the same shall be paid accordingly: *Provided*, That in no case shall transportation and subsistence be allowed at a rate exceeding fifty cents per diem.

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## ACT OF 1853, CHAPTER 96 (10 U. S. Stats. at Large, 182).

*An Act to supply Deficiencies in the Appropriations for the Service of the fiscal Year ending the thirtieth of June, one thousand eight hundred and fifty-three.*

For expenses which may be incurred in acknowledging the services of the masters and crews of foreign vessels in rescuing American citizens and American vessels from shipwreck, two thousand dollars: *Provided*, That the money shall be expended under the direction of the President of the United States.

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## RESOLUTION No. 13 (10 U. S. Stats. at Large, 262).

*A Resolution in Amendment of a Joint Resolution relating to the Duties of Inspectors of Steamers, approved the seventh day of January, eighteen hundred and fifty-three.*

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be the duty of the Inspectors of Steamers to exercise the powers conferred upon them by a joint resolution of Congress, approved the seventh day of January, eighteen hun-



dred and fifty-three, subject to all the restrictions and limitations therein contained: *Provided*, That the time granted to applicants shall in no case extend beyond the first day of June next.

SEC. 2. *And be it further resolved*, That the said Inspectors may approve of boilers and steam-pipes made prior to the first day of July next, and subsequent to the passage of the act approved the thirtieth of August eighteen hundred and fifty-two, entitled "An act to amend an act entitled an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes," if the same be not made with stamped iron: *Provided*, it shall appear that stamped iron could not be seasonably procured.

SEC. 3. *And be it further enacted*, That the said Inspectors shall hereafter be authorized and empowered, upon satisfactory proof that the owner or owners of a steamer are unable to obtain seasonably, or upon reasonable terms, a metallic life-boat, as required by said act, or that such a boat is unsuited to the navigation in which a steamer is employed, to accept in any such case a substitute or substitutes for such metallic life-boat: *Provided*, such substitute shall in their judgment afford safe and suitable means of preserving life in case of accident.

SEC. 4. *And be it further resolved*, That no person interested as patentee, in any way, direct or indirect, in life-preservers, life-boats, or any other article required for steamers by the law of August thirtieth, eighteen hundred and fifty-two, aforesaid, shall be deemed competent to hold the office of inspector or to discharge the duties thereof.

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ACT OF 1855, CHAPTER 123 (10 U. S. Stats. at Large, 614).

*An Act concerning the Apprehension and Delivery of Deserters from foreign Vessels in the Ports of the United States.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the commissioners who now are, or hereafter may be, appointed by the circuit courts of the United States, to take acknowledgments of bail, and for other purposes, may and shall exercise all the powers conferred on any court, judge, or other magistrate by the act approved the second day of March, one thousand eight hundred and twenty-nine, entitled "An Act to provide for the apprehension and delivery of deserters from certain foreign vessels in the ports of the United States."

## ACT OF 1855, CHAPTER 133 (10 U. S. Stats. at Large, 624).

*An Act to remodel the Diplomatic and Consular Systems of the United States.*

SECTION 15. *And be it further enacted*, That no consul or commercial agent of the United States shall discharge any mariner, being a citizen of the United States, in a foreign port, without requiring the payment of the two months' wages, to which said mariner is entitled under the provisions of the act of February twenty-eight, eighteen hundred and three, unless, upon due investigation into the circumstances under which the master and mariner have jointly applied for such discharge, and on a private examination of such mariner by the consul or commercial agent, separate and apart from all officers of the vessel, the consul or commercial agent shall be satisfied that it is for the interest and welfare of such mariner to be so discharged; nor shall any consul or commercial agent discharge any mariner as aforesaid without requiring the full amount of three months' wages, as provided by the above-named act, unless under such circumstances as will, in his judgment, secure the United States from all liability to expense on account of such mariner: *Provided*, That in the cases of stranded vessels, or vessels condemned as unfit for service, no payment of extra wages shall be required; and where any mariner, after his discharge, shall have incurred expense at the port of discharge before shipping again, such expense shall be paid out of the two months' wages aforesaid, and the balance only delivered to him.

SEC. 16. *And be it further enacted*, That every consul and commercial agent of the United States shall keep a detailed list of all mariners discharged by them respectively, specifying their names and the names of the vessels from which they were discharged, and the payments, if any, afterwards made on account of each, and shall make official returns of said lists half-yearly to the treasury department.

SEC. 17. *And be it further enacted*, That every consul and commercial agent of the United States shall make an official entry of every discharge which they may grant, respectively, on the list of the crew and shipping articles of the vessel from which such discharge shall be made, specifying the payment, if any, which has been required in each case; and if they shall have remitted the payment of the two months' wages to which the mariner is entitled, they shall also certify on said shipping list and articles that they have allowed the remission, upon the joint application of the master and mariner therefor, after a separate examination of the mariner, after a due investigation of all the circumstances, and after being satisfied that the discharge so allowed, without said payment, is for the interest and welfare of the mariner; and if they shall have remitted the payment of the one month's wages to which the United States is entitled, they shall certify

that they have allowed the remission, after a due investigation of all the circumstances, and after being satisfied that they are such as will, in their judgment, secure the United States from all liability to expense on account of such mariner; and a copy of all such entries and certificates shall be annually transmitted to the treasury department by the proper officers of the customs in the several ports of the United States.

SEC. 18. *And be it further enacted*, That if any consul or commercial agent of the United States, upon discharging a mariner without requiring the payment of the one month's wages to which the United States is entitled, shall neglect to certify in the manner required in such case by the preceding section of this act, he shall be accountable to the treasury department for the sum so remitted. And in any action brought by a mariner to recover the extra wages to which he is entitled under the act of February twenty-eighth, eighteen hundred and three, the defence that the payment of such wages was duly remitted shall not be sustained without the production of the certificate in such case required by this act, or, when its non-production is accounted for, by the production of a certified copy thereof; and the truth of the facts certified to, and the propriety of the remission, shall be still open to investigation.

SEC. 19. *And be it further enacted*, That if, upon the application of any mariner, it shall appear to the consul or commercial agent that he is entitled to his discharge under any act of Congress, or according to the general principles of the maritime law as recognized in the United States, he shall discharge such mariner, and shall require of the master the payment of three months' wages, as provided in the act of February twenty-eighth, eighteen hundred and three, and shall not remit the same, or any part thereof, except in the cases mentioned in the proviso of the ninth clause of the first section of the act of July twentieth, eighteen hundred and forty, to the following effect: "If the consul or other commercial agent shall be satisfied the contract has expired, or the voyage been protracted by circumstances beyond the control of the master, and without any design on his part to violate the articles of shipment, then he may, if he deems it just, discharge the mariner without exacting the three months' additional pay."

SEC. 20. *And be it further enacted*, That every consul and commercial agent, for any neglect to perform the duties enjoined upon him by this act, shall be liable to any injured person for all damages occasioned thereby; and, for any violation of the provisions of the fifteenth and nineteenth sections of this act, shall also be liable to indictment, and to a penalty in the manner provided by the eighteenth clause of the first section of the act of July twentieth, eighteen hundred and forty.

## ACT OF 1855, CHAPTER 213 (10 U. S. Stats. at Large, 715).

*An Act to regulate the Carriage of Passengers in Steamships and other Vessels.*<sup>1</sup>

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no master of any vessel owned in whole or in part by a citizen of the United States, or by a citizen of any foreign country, shall take on board such vessel, at any foreign port or place other than foreign contiguous territory<sup>2</sup> of the United States, a greater number of passengers than in proportion of one to every two tons of such vessel, not including children under the age of one year in the computation, and computing two children over one and under eight years of age as one passenger. That the spaces appropriated for the use of such passengers, and which shall not be occupied by stores or other goods, not the personal baggage of such passengers, shall be in the following proportions, viz: On the main and poop decks or platforms, and in the deck houses, if there be any, one passenger for each sixteen clear superficial feet of deck, if the height or distance between the decks or platform shall not be less than six feet; and on the lower deck (not being an orlop deck), if any, one passenger for eighteen such clear superficial feet, if the height or distance between the decks or platforms shall not be less than six feet, but so as that no passenger shall be carried on any other deck or platform, nor upon any deck where the height or distance between decks is less than six feet, with intent to bring such passenger to the United States, and shall leave such port or place and bring the same, or any number thereof, within the jurisdiction of the United States; or if any such master of any vessel shall take on board his vessel, at any port or place within the jurisdiction of the United States, any greater number of passengers than in the proportion aforesaid, to the space aforesaid, or to the tonnage aforesaid, with intent to carry the same to any foreign port or place other than foreign contiguous territory, as aforesaid, every such master shall be deemed guilty of a misdemeanor, and, upon conviction thereof, before any circuit or district court of the United States, shall, for each passenger taken on board beyond the limit aforesaid, or the space aforesaid, be fined in the sum of fifty dollars, and may also be imprisoned, at the discretion of the judge before whom the penalty shall be recovered, not exceeding six months; but should it be necessary, for the safety or convenience of the vessel, that any portion of her cargo, or any other articles or article, should be placed on, or stored in, any of the decks, cabins, or other places appropriated to the

<sup>1</sup> See Act of 1864, c. 249; Act of 1866, c. 162; Act of 1866, c. 234.

<sup>2</sup> See Act of 1864, c. 249.

use of passengers, the same may be placed in lockers or enclosures prepared for the purpose, on an exterior surface impervious to the wave, capable of being cleansed in like manner as the decks or platforms of the vessel. In no case, however, shall the places thus provided be deemed to be a part of the space allowable for the use of passengers, but the same shall be deducted therefrom, and in all cases where prepared or used the upper surface of said lockers on enclosed spaces shall be deemed and taken to be the deck or platform from which measurement shall be made for all the purposes of this act. It is also provided, that one hospital, in the spaces appropriated to passengers, and separate therefrom by an appropriate partition, and furnished as its purposes require, may be prepared, and, when used, may be included in the space allowable for passengers; but the same shall not occupy more than one hundred superficial feet of deck or platform: *Provided*, That on board two-deck ships, where the height between the decks is seven and one half feet or more, fourteen clear superficial feet of deck shall be the proportion required for each passenger.

SEC. 2. *And be it further enacted*, That no such vessel shall have more than two tiers of berths, and the interval, between the lowest part thereof and the deck or platform beneath, shall not be less than nine inches, and the berths shall be well constructed, parallel with the sides of the vessel, and separated from each other by partitions, as berths ordinarily are separated, and shall be at least six feet in length, and at least two feet in width, and each berth shall be occupied by no more than one passenger; but double berths of twice the above width may be constructed, each berth to be occupied by no more, and by no other, than two women, or by one woman and two children under the age of eight years, or by husband and wife, or by a man and two of his own children under the age of eight years, or by two men, members of the same family; and if there shall be any violation of this section in any of its provisions, then the master of the vessel, and the owners thereof, shall severally forfeit and pay the sum of five dollars for each passenger on board of said vessel on such voyage, to be recovered by the United States in any port where such vessel may arrive or depart.

SEC. 3. *And be it further enacted*, That all vessels, whether of the United States or any foreign country, having sufficient capacity or space, according to law, for fifty or more passengers (other than cabin passengers), shall, when employed in transporting such passengers between the United States and Europe, have on the upper deck, for the use of such passengers, a house over the passage-way leading to the apartments allotted to such passengers below deck, firmly secured to the deck or combings of the hatch, with two doors, the sills of which shall be at least one

foot above the deck, so constructed, that one door or window in such house may at all times be left open for ventilation; and all vessels so employed, and having the capacity to carry one hundred and fifty such passengers or more, shall have two such houses; and the stairs or ladder, leading down to the aforesaid department, shall be furnished with a hand-rail of wood or strong rope; but booby hatches may be substituted for such houses.

SEC. 4. *And be it further enacted*, That every such vessel so employed, and having the legal capacity for more than one hundred such passengers, shall have at least two ventilators to purify the apartment or apartments occupied by such passengers; one of which shall be inserted in the after part of the apartment or apartments, and the other shall be placed in the forward portion of the apartment or apartments, and one of them shall have an exhausting cap to carry off the foul air, and the other a receiving cap to carry down the fresh air; which said ventilators shall have a capacity proportioned to the size of the apartment or apartments to be purified, namely, if the apartment or apartments will lawfully authorize the reception of two hundred such passengers, the capacity of such ventilators shall each be equal to a tube of twelve inches diameter in the clear, and in proportion for larger or smaller apartments; and all said ventilators shall rise at least four feet six inches above the upper deck of any such vessel, and be of the most approved form and construction; but if it shall appear, from the report, to be made and approved, as hereinafter provided, that such vessel is equally well ventilated by any other means, such other means of ventilation shall be deemed and held to be a compliance with the provisions of this section.

SEC. 5. *And be it further enacted*, That every vessel carrying more than fifty such passengers shall have for their use on deck, housed and conveniently arranged, at least one camboose or cooking range, the dimensions of which shall be equal to four feet long and one foot six inches wide for every two hundred passengers; and provision shall be made in the manner aforesaid, in this ratio, for a greater or less number of passengers; but nothing herein contained shall take away the right to make such arrangements for cooking between decks, if that shall be deemed desirable.

SEC. 6. *And be it further enacted*, That all vessels employed as aforesaid shall have on board, for the use of such passengers, at the time of leaving the last port whence such vessel shall sail, well secured under deck, for each passenger, at least twenty pounds of good navy bread, fifteen pounds of rice, fifteen pounds of oatmeal, ten pounds of wheat flour, fifteen pounds of peas and beans, twenty pounds of potatoes, one pint of vinegar, sixty gallons of fresh water, ten pounds of salted pork, and ten pounds of salt beef, free of bone, all to be of good quality; but at places where either

rice, oatmeal, wheat flour, or peas and beans cannot be procured, of good quality and on reasonable terms, the quantity of either or any of the other last-named articles may be increased and substituted therefor ; and, in case potatoes cannot be procured on reasonable terms, one pound of either of said articles may be substituted in lieu of five pounds of potatoes ; and the captains of such vessels shall deliver to each passenger at least one tenth part of the aforesaid provisions weekly, commencing on the day of sailing, and at least three quarts of water daily ; and if the passengers on board of any such vessel in which the provisions and water herein required shall not have been provided as aforesaid, shall, at any time, be put on short allowance during any voyage, the master or owner of any such vessel shall pay to each and every passenger who shall have been put on short allowance the sum of three dollars for each and every day they may have been put on short allowance, to be recovered in the circuit or district court of the United States ; and it shall be the duty of the captain or master of every such ship or vessel to cause the food and provisions of all the passengers to be well and properly cooked daily, and to be served out and distributed to them at regular and stated hours, by messes, or in such other manner as shall be deemed best and most conducive to the health and comfort of such passengers, of which hours and manner of distribution, due and sufficient notice shall be given. If the captain or master of any such ship or vessel, shall wilfully fail to furnish and distribute such provisions, cooked as aforesaid, he shall be deemed guilty of a misdemeanor, and upon conviction thereof before any circuit or district court of the United States, shall be fined not more than one thousand dollars, and shall be imprisoned for a term not exceeding one year : *Provided*, That the enforcement of this penalty shall not affect the civil responsibility of the captain or master and owners to such passengers as may have suffered from said default.

SEC. 7. *And be it further enacted*, That the captain of any such vessel so employed is hereby authorized to maintain good discipline and such habits of cleanliness among such passengers as will tend to the preservation and promotion of health ; and to that end he shall cause such regulations as he may adopt for this purpose to be posted up, before sailing, on-board such vessel, in a place accessible to such passengers, and shall keep the same so posted up during the voyage ; and it is hereby made the duty of said captain to cause the apartments occupied by such passengers to be kept at all times in a clean, healthy state ; and the owners of every such vessel so employed are required to construct the decks and all parts of said apartment so that it can be thoroughly cleansed ; and they shall also provide a safe, convenient privy or water-closet for the exclusive use of every one hundred such passengers. And when the weather is such that said passengers cannot be mustered on deck with their bedding, it shall be the duty of

the captain of every such vessel to cause the deck, occupied by such passengers, to be cleansed with chloride of lime, or some other equally efficient disinfecting agent, and also at such other times as said captain may deem necessary.

SEC. 8. *And be it further enacted*, That the master and owner or owners of any such vessel so employed, which shall not be provided with the house or houses over the passage-ways, as prescribed in the third section of this chapter, or with ventilators, as prescribed in the fourth section of this chapter, or with the cambooses or cooking ranges, with the houses over them, as prescribed in the fifth section of this chapter, shall severally forfeit and pay to the United States the sum of two hundred dollars for each and every violation of, or neglect to conform to, the provisions of each of said sections, and fifty dollars for each and every neglect or violation of any of the provisions of the seventh section of this chapter, to be recovered by suit in any circuit or district court of the United States within the jurisdiction of which the said vessel may arrive, or from which she may be about to depart, or at any place within the jurisdiction of such courts, wherever the owner or owners, or captain of such vessel may be found.

SEC. 9. *And be it further enacted*, That the collector of the customs at any port of the United States, at which any vessel so employed shall arrive, or from which any such vessel shall be about to depart, shall appoint and direct one or more of the inspectors of the customs for such port to examine such vessel, and report in writing to such collector, whether the requirements of law have been complied with in respect to such vessel; and if such report shall state such compliance, and shall be approved by such collector, it shall be deemed and held as *prima facie* evidence thereof.

SEC. 10. *And be it further enacted*, That the provisions, requisitions, penalties, and liens of this act, relating to the space in vessels appropriated to the use of passengers, are hereby extended and made applicable to all spaces appropriated to the use of steerage passengers in vessels propelled in whole or in part by steam, and navigating from, to, and between the ports, and in manner as in this act named, and to such vessels and to the masters thereof; and so much of the act entitled "An act to amend an act entitled an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam, and for other purposes," approved August thirtieth, eighteen hundred and fifty-two, as conflicts with this act, is hereby repealed; and the space appropriated to the use of steerage passengers in vessels so as above propelled and navigated, is hereby subject to the supervision and inspection of the collector of the customs at any port of the United States at which any such vessel shall arrive, or from which she shall be about to depart; and the same



shall be examined and reported in the same manner and by the same officers by the next preceding section directed to examine and report.

SEC. 11. *And be it further enacted*, That the vessels bound from any port in the United States to any port or place in the Pacific Ocean, or on its tributaries, or from any such port or place to any port in the United States on the Atlantic or its tributaries, shall be subject to the foregoing provisions regulating the carriage of passengers in merchant vessels, except so much as relates to provisions and water; but the owners and masters of all such vessels shall in all cases furnish to each passenger the daily supply of water therein mentioned; and they shall furnish a sufficient supply of good and wholesome food, properly cooked; and in case they shall fail so to do, or shall provide unwholesome or unsuitable provisions, they shall be subject to the penalty provided in the sixth section of this chapter, in case the passengers are put on short allowance of water or provisions.

SEC. 12. *And be it further enacted*, That the captain or master of any ship or vessel arriving in the United States, or any of the territories thereof, from any foreign place whatever, at the same time that he delivers a manifest of the cargo, and if there be no cargo, then at the time of making report or entry of the ship or vessel, pursuant to law, shall also deliver and report to the collector of the district in which such ship or vessel shall arrive, a list or manifest of all the passengers taken on board of the said ship or vessel at any foreign port or place; in which list or manifest it shall be the duty of the said master to designate particularly the age, sex, and occupation of the said passengers respectively, the part of the vessel occupied by each during the voyage, the country to which they severally belong, and that of which it is their intention to become inhabitants; and shall further set forth whether any and what number have died on the voyage; which list or manifest shall be sworn to by the said master, in the same manner as directed by law in relation to the manifest of the cargo; and the refusal or neglect of the master aforesaid to comply with the provisions of this section, or any part thereof, shall incur the same penalties, disabilities, and forfeitures as are provided for a refusal or neglect to report and deliver a manifest of the cargo aforesaid.

SEC. 13. *And be it further enacted*, That each and every collector of the customs, to whom such manifest or list of passengers as aforesaid shall be delivered, shall quarter-yearly return copies thereof to the secretary of state of the United States, by whom statements of the same shall be laid before Congress at each and every session.

SEC. 14. *And be it further enacted*, That in case there shall have occurred on board any ship or vessel arriving at any port or place within the United States or its territories, any death or deaths among the passengers (other than cabin passengers), the master, or captain, or owner, or com-

signee of such ship or vessel, shall, within twenty-four hours after the time within which the report and list or manifest of passengers mentioned in section twelve of this act, is required to be delivered to the collector of the customs, pay to the said collector the sum of ten dollars for each and every passenger above the age of eight years, who shall have died on the voyage by natural disease; and the said collector shall pay the money thus received, at such times and in such manner as the secretary of the treasury, by general rules, shall direct, to any board or commission appointed by and acting under the authority of the State within which the port where such ship or vessel arrived is situated, for the care and protection of sick, indigent, or destitute emigrants, to be applied to the objects of their appointment; and if there be more than one board or commission who shall claim such payment, the secretary of the treasury, for the time being, shall determine which is entitled to receive the same, and his decision in the premises shall be final and without appeal: *Provided*, That the payment shall, in no case, be awarded or made to any board, or commission, or association, formed for the protection or advancement of any particular class of emigrants, or emigrants of any particular nation or creed; and if the master, captain, owner, or consignee of any ship or vessel refuse or neglect to pay to the collector the sum and sums of money required, and within the time prescribed by this section, he or they shall severally forfeit and pay the sum of fifty dollars, in addition to such sum of ten dollars, for each and every passenger upon whose death the same has become payable, to be recovered by the United States, in any circuit or district court of the United States where such vessel may arrive, or such master, captain, owner, or consignee may reside; and when recovered, the said money shall be disposed of in the same manner as is directed with respect to the sum and sums required to be paid to the collector of customs.

SEC. 15. *And be it further enacted*, That the amount of the several penalties imposed by the foregoing provisions regulating the carriage of passengers in merchant vessels, shall be liens on the vessel or vessels violating those provisions, and such vessel or vessels shall be libelled therefor in any circuit or district court of the United States, where such vessel or vessels shall arrive.

SEC. 16. *And be it further enacted*, That all and every vessel or vessels which shall or may be employed by the American Colonization Society or the colonization society of any State, to transport, and which shall actually transport, from any port or ports of the United States to any colony or colonies on the west coast of Africa, colored emigrants, to reside there, shall be, and the same are hereby, subjected to the operation of the foregoing provisions, regulating the carriage of passengers in merchant vessels.

SEC. 17. *And be it further enacted*, That the collector of the customs shall examine each emigrant ship or vessel, on its arrival at his port, and ascertain and report to the secretary of the treasury the time of sailing, the length of

the voyage, the ventilation, the number of passengers, their space on board, their food, the native country of the emigrants, the number of deaths, the age and sex of those who died during the voyage; together with his opinion of the cause of the mortality, if any, on board, and, if none, what precautionary measures, arrangements, or habits are supposed to have had any, and what agency in causing the exemption.

SEC. 18. *And be it further enacted*, That this act shall take effect, with respect to vessels sailing from ports in the United States on the eastern side of the continent, within thirty days from the time of its approval; and with respect to vessels sailing from ports in the United States on the western side of the continent, and from ports in Europe, within sixty days from the time of its approval; and with respect to vessels sailing from ports in other parts of the world, within six months from the time of its approval.

And it is hereby made the duty of the secretary of state to give notice, in the ports of Europe, and elsewhere, of this act, in such manner as he shall deem proper.

SEC. 19. *And be it further enacted*, That from and after the time that this act shall take effect with respect to any vessels, then, in respect to such vessels, the act of second March, eighteen hundred and nineteen, entitled "An act regulating passenger ships and vessels," the act of twenty-second of February, eighteen hundred and forty-seven, entitled "An act to regulate the carriage of passengers in merchant vessels"; the act of second March, eighteen hundred and forty-seven, entitled "An act to amend an act entitled 'An act to regulate the carriage of passengers in merchant vessels,' and to determine the time when said act shall take effect"; the act of thirty-first January, eighteen hundred and forty-eight, entitled "An act exempting vessels employed by the American Colonization Society in transporting colored emigrants from the United States to the coast of Africa from the provisions of the acts of the twenty-second February and second of March, eighteen hundred and forty-seven, regulating the carriage of passengers in merchant vessels"; the act of seventeenth May, eighteen hundred and forty-eight, entitled "An act to provide for the ventilation of passenger vessels, and for other purposes"; and the act of third March, eighteen hundred and forty-nine, entitled "An act to extend the provisions of all laws now in force relating to the carriage of passengers in merchant vessels, and the regulation thereof," are hereby repealed. But nothing in this act contained shall in any wise obstruct or prevent the prosecution, recovery, distribution, or remission of any fines, penalties, or forfeitures, which may have been incurred in respect to any vessels prior to the day this act goes into effect, in respect to such vessels, under the laws hereby repealed, for which purpose the said laws shall continue in force.

But the secretary of the treasury may, in his discretion, and upon such

conditions as he shall think proper, discontinue any such prosecutions, or remit or modify such penalties.

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ACT OF 1856, CHAPTER 127 (11 U. S. Stats. at Large, 59).

*An Act to regulate the Diplomatic and Consular Systems of the United States, and to provide for the Discharge and Desertion of Seamen.*

SECTION 20. *And be it further enacted*, That the compensation provided by this act shall be in full for all the services and personal expenses which shall be rendered or incurred by the officers or persons respectively for whom such compensation is provided, of whatever nature or kind such services or personal expenses may be, or by whatever treaty, law, or instructions such services or personal expenses so rendered or incurred are or shall be required; and no allowance, other than such as is provided by this act, shall be made in any case for the outfit or return home of any such officer or person; and no consular officer shall, nor shall any person under any consular officer, make any charge or receive, directly or indirectly, any compensation, by way of commission or otherwise, for receiving or disbursing the wages or extra wages to which any seaman or mariner shall be entitled who shall be discharged in any foreign country, or for any money advanced to any such seaman or mariner who shall seek relief from any consulate or commercial agency; nor shall any consular officer, or any person under any consular officer, be interested, directly or indirectly, in any profit derived from clothing, boarding, or otherwise supplying or sending home any such seaman or mariner: *Provided*, That such prohibition as to profit shall not be construed to relieve or prevent any such officer who shall be the owner or otherwise interested in any ship or vessel of the United States, from transporting in such ship or vessel any such seaman or mariner, or from receiving or being interested in such reasonable allowance as may be made for such transportation, under and by virtue of the fourth section of the act, entitled "An act supplementary to the act concerning consuls and vice-consuls, and for the further protection of American seamen," approved February twenty-eighth, eighteen hundred and three.

SEC. 25. *And be it further enacted*, That whenever any seaman or mariner of any vessel of the United States shall desert such vessel, the master or commander of such vessel shall note the fact and date of such desertion on the list of the crew, and the same shall be officially authenticated at the port or place of the consulate or commercial agency first visited by such vessel after such desertion, if such desertion shall have occurred in a foreign country, or if in such case such vessel shall not visit any place

where there shall be any consulate or commercial agency before her return to the United States, or the desertion shall have occurred in this country, the fact and time of such desertion shall be officially authenticated before a notary-public immediately at the first port or place where such vessel shall arrive after such desertion; and all wages that may be due to such seaman or mariner, and whatever interest he may have in the cargo of such vessel, shall be forfeited to and become the property of the United States, and paid over for their use to the collector of the port where the crew of such vessel are accounted for as soon as the same can be ascertained; first deducting therefrom any expense which may necessarily have been incurred on account of such vessel in consequence of such desertion; and in settling the account of such wages or interest no allowance or deduction shall be made except for moneys actually paid, or goods at a fair price supplied, or expenses incurred to, or for such seaman or mariner, any receipt or voucher from, or arrangement with such seaman or mariner to the contrary notwithstanding.

SEC. 26. *And be it further enacted*, That upon the application of any seaman or mariner for a discharge, if it shall appear to the consular officer that he is entitled to his discharge under any act of Congress, or according to the general principles or usages of maritime law, as recognized in the United States, he shall discharge such seaman or mariner, and shall require from the master or commander of the ship or vessel from which such discharge shall be made, the payment of three months' extra wages, as provided by the act hereinbefore mentioned, approved February twenty-eighth, eighteen hundred and three; and it shall be the duty of such master or commander to pay the same, and no such payment or any part thereof shall be remitted in any case, except such as are mentioned in the proviso of the ninth clause of the act, entitled "An act in addition to the several acts regulating the shipment and discharge of seamen and the duties of consuls," approved July twentieth, eighteen hundred and forty, and as hereinafter provided, and the extra wages required to be paid by the said ninth clause of the last hereinbefore mentioned act, and by this section, shall be applicable to the same purposes and in the same manner as is directed by the said act approved February twenty-eighth, eighteen hundred and three, in regard to the extra wages required to be paid thereby; and if any consular officer, when discharging any seaman or mariner, shall neglect to require the payment of and collect the extra wages required to be paid in the case of the discharge of any seaman or mariner, by either of the said acts, as far as they shall remain in force under this act or by this act, he shall be accountable to the United States for the full amount of their share of such wages, and to such seaman or mariner to the full amount of his share thereof; and if any seaman or

mariner shall, after his discharge, have incurred any expense for board or other necessities at the port or place of his discharge before shipping again, such expense shall be paid out of the share of the three months' wages to which he shall be entitled, which shall be retained for that purpose, and the balance only paid over to him: *Provided, however,* That in cases of wrecked or stranded ships or vessels, or ships or vessels condemned as unfit for service, no payment of extra wages shall be required.

SEC. 27. *And be it further enacted,* That every consular officer shall keep a detailed list of all seamen and mariners shipped and discharged by him, specifying their names and the names of the vessels on and from which they shall be shipped and discharged, and the payments, if any, made on account of each so discharged, and also of the number of the vessels arrived and departed, and the amounts of their registered tonnage, and the number of their seamen and mariners, and of those who are protected, and whether citizens of the United States or not, and as nearly as possible the nature and value of their cargoes, and where produced, and make returns of the same, with their accounts and other returns, to the secretary of the treasury; and no consular officer shall certify any invoice unless he shall be satisfied that the person making the oath or affirmation thereto is the person he represents himself to be, that he is a credible person, and that the statements made under such oath or affirmation are true; and he shall, thereupon, by his certificate, state that he was so satisfied; and it shall be the duty of every consular officer to furnish to the secretary of the treasury, as often as shall be required, the prices current of all articles of merchandise usually exported to the United States from the port or place in which he shall be located.

SEC. 28. *And be it further enacted,* That it shall be the duty of every master and commander of a ship or vessel of the United States, whenever he shall have occasion for any consular or other official service, which any consular officer of the United States shall be authorized by law or usage officially to perform, and for which any fees shall be allowed by the said rates or tariffs of fees as aforesaid, to apply to such one of the said officers as may then be officially located at the consulate or commercial agency, if any there be where such service shall be required, to perform such service, and such master or commander shall pay to such officer such fees as shall be allowed for such service, in pursuance of the provisions of this act; and if any such master or commander shall omit so to do, he shall be liable to the United States for the amount of the fees lawfully chargeable for such services, as though the said services had been performed by such officer; and all consular officers are hereby authorized and required to retain in their possession all the papers of such ships and vessels, which shall be deposited with them as directed by law, till payment shall be made of all demands and wages on account of such ships and vessels.

## ACT OF 1858, CHAPTER 145 (11 U. S. Stats. at Large, 313).

*An Act to repeal the Fifth Section of an Act entitled "An Act to authorize the Register or Enrolment and License to be issued in the Name of the President or Secretary of any incorporated Company owning a Steamboat or Vessel," approved March third, eighteen hundred and twenty-five.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the fifth section of "An act to authorize the register or enrolment and license to be issued in the name of the president or secretary of any incorporated company owning a steamboat or vessel," approved March third, eighteen hundred and twenty-five, be, and the same is hereby, repealed.*

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## ACT OF 1859, CHAPTER 8 (11 U. S. Stats. at Large, 375).

*An Act to repeal an Act entitled "An Act authorizing the Secretary of the Treasury to change the Names of Vessels in certain Cases, approved the fifth of March, one thousand eight hundred and fifty-six.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the act entitled, "An Act authorizing the secretary of the treasury to change the names of vessels in certain cases," approved fifth March, one thousand eight hundred and fifty-six, be, and the same is hereby, repealed.*

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## ACT OF 1860, CHAPTER 8 (12 U. S. Stats. at Large, 3).

*An Act to amend an Act entitled "An Act to regulate the Carriage of Passengers in Steamships and other Vessels," approved March third, eighteen hundred and fifty-five, for the better Protection of Female Passengers, and other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every master or other officer, seaman or other person, employed on board of any ship or vessel of the United States, who shall, during the voyage of such ship or vessel, under promise of marriage, or by threats, or by the exercise of his authority, or by solicitation, or the making of gifts or presents, seduce and have illicit connection with any female passenger, shall be guilty of a misdemeanor, and, upon conviction, shall be punished by imprisonment for a term not exceeding twelve months, or by a fine not exceeding one thousand dollars: Provided, That the subsequent intermarriage of the parties seducing and seduced may be pleaded in bar of a conviction.*

SEC. 2. *And be it further enacted, That neither the officers, seamen, nor*

other persons employed on board of any ship or vessel bringing emigrant passengers to the United States, or any of them, shall visit or frequent any part of such ship or vessel assigned to emigrant passengers, except by the direction or permission of the master or commander of such ship or vessel first made or given for such purpose ; and every officer, seaman, or other person employed on board of such ship or vessel, who shall violate the provisions of this section shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall forfeit to the said ship or vessel his wages for the voyage of the said ship or vessel during which the said offence has been committed. Any master or commander who shall direct or permit any officer or seaman or other person employed on board of such ship or vessel, to visit or frequent any part of said ship or vessel assigned to emigrant passengers, except for the purpose of doing or performing some necessary act or duty as an officer, seamen, or person employed on board of said ship or vessel, shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be punished by a fine of fifty dollars for each occasion on which he shall so direct or permit the provisions of this section to be violated by any officer, seaman, or other person employed on board of such ship or vessel.

SEC. 3. *And be it further enacted*, That it shall be the duty of the master or commander of every ship or vessel bringing emigrant passengers to the United States to post a written or printed notice in the English, French, and German languages containing the provisions of the second section of this act in a conspicuous place on the fore-castle, and in the several parts of the said ship or vessel assigned to emigrant passengers, and to keep the same so posted during the voyage ; and upon neglect so to do, he shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars.

SEC. 4. *And be it further enacted*, That, in case of the conviction of any person under the provisions of the first section of this act, and the imposition of a fine, the court sentencing the person so convicted may, in its discretion, by an order to be entered on its minutes, direct the amount of the fine, when collected, to be paid for the use or benefit of the female seduced, or her child or children, if any.

SEC. 5. *And be it further enacted*, That no conviction shall be had under the provisions of this act on the testimony of the female seduced uncorroborated by other evidence, nor unless the indictment shall be found within one year after the arrival of the ship or vessel at the port for which she was destined when the offence was committed.



## ACT OF 1861, CHAPTER 7 (12 U. S. Stats. at Large, 264).

*An Act to alter and regulate the Navy Ration.*<sup>1</sup>

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the navy ration shall consist of the following daily allowance of provisions to each person: One pound of salt pork, with half a pint of beans or peas; or one pound of salt beef, with half a pound of flour, and two ounces of dried apples, or other dried fruit; or three quarters of a pound of preserved meat, with half a pound of rice, two ounces of butter, and one ounce of desiccated "mixed vegetables"; or three quarters of a pound of preserved meat, two ounces of butter, and two ounces of desiccated potato; together with fourteen ounces of biscuit, one quarter of an ounce of tea, or one ounce of coffee, or cocoa, two ounces of sugar, and a gill of spirits; and of a weekly allowance of half a pound of pickles, half a pint of molasses, and half a pint of vinegar.

SEC. 2. *And be it further enacted,* That fresh or preserved meat may be substituted for salt beef or pork, and vegetables for the other articles usually issued with the salted meats; allowing one and a quarter pound of fresh, or three quarters of a pound of preserved meat for one pound of salted beef or pork; and regulating the quantity of vegetables so as to equal the value of the articles for which they may be substituted.

SEC. 3. *And be it further enacted,* That should it be necessary to vary the above-described daily allowance, it shall be lawful to substitute one pound of soft bread, or one pound of flour, or half a pound of rice, for fourteen ounces of biscuit; half a pint of wine for a gill of spirits; half a pound of rice for half a pint of beans or peas; half a pint of beans or peas for half a pound of rice.

SEC. 4. *And be it further enacted,* That in case of necessity, the daily allowance of provisions may be diminished or varied by the discretion of the senior officer present in command; but payment shall be made to the persons whose allowance shall be thus diminished, according to the scale of prices which is, or may be, established for the same; but a commander who shall thus make a diminution or variation shall report to his commanding officer, or to the Navy Department, the necessity for the same, and give to the paymaster written orders, specifying particularly the diminution or reduction which is to be made.

SEC. 5. *And be it further enacted,* That no commissioned or warrant officer, or any person under twenty-one years of age, shall be allowed to draw the spirit part of the daily ration; and all other persons shall be per-

<sup>1</sup> See Act of 1862, c. 57, § 4; Act of 1862, c. 164, § 4.

mitted to relinquish that part of their rations under such restriction as the President of the United States may authorize ; and that the spirit portion of the daily ration may be suspended or stopped by the commanding officer, whenever, in his opinion, it shall be expedient, for cause of drunkenness ; and to any person who, by this section, is prohibited from drawing, or who may relinquish, the spirit part of his ration, there shall be paid, in lieu thereof, the sum of four cents per day.

SEC. 6. *And be it further enacted*, That the provisions of this act shall go into effect in the United States on the first day of the succeeding quarter after it becomes a law ; and in vessels abroad, on the first day of the succeeding quarter after its official receipt ; that any acts and parts of acts which may be contrary to, or inconsistent with, the provisions of this act, shall be, and are hereby, repealed.

SEC. 7. *And be it further enacted*, That the Secretary of the Navy be authorized to procure the preserved meats, pickles, butter, and desiccated vegetables in such manner and under such restrictions and guarantees as in his opinion will best insure the good quality of said articles.

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ACT OF 1861, CHAPTER 48 (12 U. S. Stats. at Large, 314).

*An Act supplementary to an Act entitled " An Act to protect the Commerce of the United States, and punish the Crime of Piracy."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any vessel or boat which shall be built, purchased, fitted out in whole or in part, or held for the purpose of being employed in the commission of any piratical aggression, search, restraint, depredation, or seizure, or in the commission of any other act of piracy, as defined by the law of nations, shall be liable to be captured and brought into any port of the United States if found upon the high seas, or to be seized if found in any port or place within the United States, whether the same shall have actually sailed upon any piratical expedition or not, and whether any act of piracy shall have been committed or attempted upon or from such vessel or boat or not ; and any such vessel or boat may be adjudged and condemned, if captured by a vessel authorized as hereinafter mentioned, to the use of the United States and to that of the captors, and if seized by a collector, surveyor, or marshal, then to the use of the United States, after due process and trial, in like manner as is provided in section four of the act to which this act is supplementary, which section is hereby made in all respects applicable to cases arising under this act.

SEC. 2. *And be it further enacted*, That the President of the United

States be, and hereby is, authorized to instruct the commanders of the public armed vessels of the United States, and to authorize the commanders of any other armed vessels sailing under the authority of any letters of marque and reprisal granted by the Congress of the United States, or the commanders of any other suitable vessels, to subdue, seize, take, and, if on the high seas, to send into any port of the United States any vessel or boat built, purchased, fitted out, or held, as in the first section of this act mentioned.

SEC. 3. *And be it further enacted*, That the collectors of the several ports of entry, the surveyors of the several ports of delivery, and the marshals of the several judicial districts within the United States be and are hereby authorized and required to seize any and all vessels or boats built, purchased, fitted out, or held as aforesaid, which may be found within their respective ports or districts, and to cause the same to be proceeded against and disposed of as hereinbefore provided.

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ACT OF 1862, CHAPTER 27 (12 U. S. Stats. at Large, 340).

*An Act to prohibit the "Coolie Trade" by American Citizens in American Vessels.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no citizen or citizens of the United States, or foreigner coming into or residing within the same, shall, for himself or for any other person whatsoever, either as master, factor, owner, or otherwise, build, equip, load, or otherwise prepare, any ship or vessel, or any steamship or steam vessel, registered, enrolled, or licensed in the United States, or any port within the same, for the purpose of procuring from China, or from any port or place therein, or from any other port or place the inhabitants or subjects of China, known as "coolies," to be transported to any foreign country, port, or place whatever, to be disposed of, or sold, or transferred, for any term of years or for any time whatever, as servants or apprentices, or to be held to service or labor. And if any ship or vessel, steamship, or steam vessel, belonging in whole or in part to citizens of the United States, and registered, enrolled, or otherwise licensed as aforesaid, shall be employed for the said purposes, or in the "coolie trade," so called, or shall be caused to procure or carry from China or elsewhere, as aforesaid, any subjects of the Government of China for the purpose of transporting or disposing of them as aforesaid, every such ship or vessel, steamship, or steam vessel, her tackle, apparel, furniture, and other appurtenances, shall be forfeited to the United States, and shall be liable to be seized, prosecuted, and condemned in any of the circuit courts or district courts of the United States for the district where the

said ship or vessel, steamship or steam vessel may be found, seized, or carried.

SEC. 2. *And be it further enacted*, That every person who shall so build, fit out, equip, load, or otherwise prepare, or who shall send to sea, or navigate, as owner, master, factor, agent, or otherwise, any ship or vessel, steamship or steam vessel, belonging in whole or in part to citizens of the United States, or registered, enrolled, or licensed within the same, or at any port thereof, knowing or intending that the same shall be employed in that trade or business aforesaid, contrary to the true intent and meaning of this act, or in any wise aiding or abetting therein, shall be severally liable to be indicted therefor, and, on conviction thereof, shall be liable to a fine not exceeding two thousand dollars and be imprisoned not exceeding one year.

SEC. 3. *And be it further enacted*, That if any citizen or citizens of the United States shall, contrary to the true intent and meaning of this act, take on board of any vessel, or receive or transport any such persons as are above described in this act, for the purpose of disposing of them as aforesaid, he or they shall be liable to be indicted therefor, and, on conviction thereof, shall be liable to a fine not exceeding two thousand dollars and be imprisoned not exceeding one year.

SEC. 4. *And be it further enacted*, That nothing in this act hereinbefore contained shall be deemed or construed to apply to or affect any free and voluntary emigration of any Chinese subject, or to any vessel carrying such person as passenger on board the same: *Provided, however*, That a permit or certificate shall be prepared and signed by the consul or consular agent of the United States residing at the port from which such vessel may take her departure, containing the name of such person, and setting forth the fact of his voluntary emigration from such port or place, which certificate shall be given to the master of such vessel; but the same shall not be given until such consul or consular agent shall be first personally satisfied by evidence produced of the truth of the facts therein contained.

SEC. 5. *And be it further enacted*, That all the provisions of the act of Congress, approved February twenty-second, eighteen hundred and forty-seven, entitled "An act to regulate the carriage of passengers in merchant vessels," and all the provisions of the act of Congress approved March third, eighteen hundred and forty-nine, entitled "An act to extend the provisions of all laws now in force relating to the carriage of passengers in merchant vessels and the regulation thereof," shall be extended and shall apply to all vessels owned in whole or in part by citizens of the United States, and registered, enrolled, or licensed within the United States, propelled by wind or by steam, and to all masters thereof, carrying passengers or intending to carry passengers from any foreign port or place without the

United States to any other foreign port or place without the United States ; and that all penalties and forfeitures provided for in said act shall apply to vessels and masters last aforesaid.

SEC. 6. *And be it further enacted*, That the President of the United States shall be, and he is hereby, authorized and empowered, in such way and at such time as he shall judge proper to the end that the provisions of this act may be enforced according to the true intent and meaning thereof, to direct and order the vessels of the United States, and the masters and commanders thereof, to examine all vessels navigated or owned in whole or in part by citizens of the United States, and registered, enrolled, or licensed under the laws of the United States, wherever they may be, whenever, in the judgment of such master or commanding officer thereof, reasonable cause shall exist to believe that such vessel has on board, in violation of the provisions of this act, any subjects of China known as "coolies," for the purpose of transportation ; and upon sufficient proof that such vessel is employed in violation of the provisions of this act, to cause such vessel to be carried, with her officers and crew, into any port or district within the United States, and delivered to the marshal of such district, to be held and disposed of according to the provisions of this act.

SEC. 7. *And be it further enacted*, That this act shall take effect from and after six months from the day of its passage.

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ACT OF 1862, CHAPTER 57 (12 U. S. Stats. at Large, 381).

*An Act making additional Appropriations for the Naval Service for the Year ending June thirty, eighteen hundred and sixty-two.*

SECTION 4. *And be it further enacted*, That the secretary of the navy be authorized to commute the navy ration of coffee and sugar for the extract of coffee combined with milk and sugar, to be procured in the same manner and under like restrictions and guarantees as are preserved meats, pickles, butter, and desiccated vegetables, if he shall believe it will be conducive to the health and comfort of the navy, and not more expensive to the Government than the present ration, and if it shall be acceptable to the men.

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ACT OF 1862, CHAPTER 164 (12 U. S. Stats. at Large, 565).

*An Act making Appropriations for the Naval Service for the Year ending thirtieth of June, eighteen hundred and sixty-three, and for other Purposes.*

SECTION 4. *And be it further enacted*, That from and after the first day of September, eighteen hundred and sixty-two, the spirit ration in the navy

of the United States shall forever cease, and thereafter no distilled spirituous liquors shall be admitted on board of vessels-of-war except as medical stores, and upon the order and under the control of the medical officers of such vessels, and to be used only for medical purposes. From and after the said first day of September next there shall be allowed and paid to each person in the navy now entitled to the spirit ration five cents per day in commutation and lieu thereof, which shall be in addition to their present pay.

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ACT OF 1863, CHAPTER 90 (12 U. S. Stats. at Large, 762).

*An Act to protect the Liens upon Vessels in certain Cases, and for other Purposes.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in all cases now and hereafter pending wherein any ship, vessel, or other property shall be condemned in any proceeding by virtue of the acts\* above mentioned, or of any other laws on that subject, the court rendering judgment of condemnation shall, notwithstanding such condemnation, and before awarding such ship, vessel, or other property, or the proceeds thereof, to the United States, or to any informer, first provide for the payment, out of the proceeds of such ship, vessel, or other property, of any *bonâ fide* claims which shall be filed by any loyal citizen of the United States, or of any foreign state or power at peace and amity with the United States, intervening in such proceeding, and which shall be duly established by evidence as a valid claim against such ship, vessel, or other property, under the laws of the United States or of any loyal state thereof: *Provided*, That no such claim shall be allowed in any case where the claimant shall have knowingly participated in the illegal use of such ship, vessel, or other property: *And provided, also*, That this act shall extend to such claims only as might have been enforced specifically against such ship, vessel, or other property, in any loyal state wherein such claim arose.

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ACT OF 1863, CHAPTER 95 (12 U. S. Stats. at Large, 769).

*An Act to facilitate the taking of Depositions within the United States, to be used in the Courts of other Countries, and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the testimony of

\* Reference is had to the act of July 13, 1861, c. 3, and to the act of August 6, 1861, c. 60, which were recited in the title of the bill as reported. When the act was passed, its title was changed, but this clause was not altered.

any witness residing within the United States, to be used in any suit for the recovery of money or property depending in any court in any foreign country with which the United States are at peace, and in which the government of such foreign country shall be a party or shall have an interest, may be obtained, to be used in such suit. If a commission or letters rogatory to take such testimony shall have been issued from the court in which said suit is pending, on producing the same before the district judge of any district where said witness resides or shall be found, and on due proof being made to such judge that the testimony of any witness is material to the party desiring the same, such judge shall issue a summons to such witness requiring him to appear before the officer or commissioner named in such commission or letters rogatory, to testify in such suit. Such summons shall specify the time and place at which such witness is required to attend, which place shall be within one hundred miles of the place where said witness resides or shall be served with said summons.

SEC. 2. *And be it further enacted*, That if any person shall refuse or neglect to appear at the time and place mentioned in the summons issued, in accordance with this act, or if, upon his appearance, he shall refuse to testify, he shall be liable to the same penalties as would be incurred for a like offence on the trial of a suit in the district court of the United States.

SEC. 3. *And be it further enacted*, That every witness who shall appear and testify, in manner aforesaid, shall be allowed and shall receive from the party, at whose instance he shall have been summoned, the same fees and mileage as are allowed to witnesses in suits depending in the district courts of the United States.

SEC. 4. *And be it further enacted*, That, whenever any commission or letters rogatory, issued to take the testimony of any witness in a foreign country, in any suit in which the United States are parties or have an interest, shall have been executed by the court or the commissioner to whom the same shall have been directed, the same shall be returned by such court or commissioner to the minister or consul of the United States nearest the place where said letters or commission shall have been executed, who, on receiving the same, shall indorse thereon a certificate, stating the time and place when and where the same was received; and that the said deposition is in the same condition as when he received the same; and he shall thereupon transmit the said letters or commission, so executed and certified, by mail, to the clerk of the court from which the same issued, in the manner in which his official despatches are transmitted to the Government. And the testimony of witnesses so, as aforesaid, taken and returned, shall be read as evidence on the trial of the suit in which the same shall have been taken, without objection as to the method of returning the same.

## ACT OF 1864, CHAPTER 40 (13 U. S. Stats. at Large, 36).

*An Act to provide for carrying the Mails from the United States to foreign Ports and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all steamers and sailing vessels belonging to citizens of the United States, and bound from any port in the United States to any foreign port, or from any foreign port to any port in the United States, shall, before clearance, receive on board and securely convey all such mails as the post-office department of the United States, or any minister, consul, or commercial agent of the United States abroad shall offer, and promptly deliver the same to the proper authorities, on arriving at the port of destination, and shall receive for such service such reasonable compensation as may be allowed by law.

SEC. 2. *And be it further enacted,* That upon the entry of every steamer or sailing vessel from any foreign port, the master or commander thereof shall make return, on oath, or affirmation, showing that he has promptly delivered at such foreign port or ports all mails placed on board of the steamer or vessel under his command before clearance from the United States. And in case the master or commander shall fail to make oath or affirmation, as aforesaid, showing that he has delivered the mails placed on board his steamer or vessel in good faith, the said steamer or vessel shall not be entitled to the privileges of a steamer or vessel of the United States.

SEC. 3. *And be it further enacted,* That the postmaster-general be, and is hereby, authorized to make contracts, to continue not exceeding four years, for the transportation of all mailable matter other than letters, and of such letters as may be so directed, by the Isthmus of Panama or the Nicaragua route, or both of them: *Provided,* That the expenditure for the service shall not exceed one hundred and sixty thousand dollars per annum. And in case more than one company is engaged in rendering this service, the postmaster-general shall determine the proportion which shall be paid to each.

SEC. 4. *And be it further enacted,* That all mailable matter which may be conveyed by mail westward beyond the western boundary of Kansas, and eastward from the eastern boundary of California shall be subject to prepaid letter-postage rates: *Provided, however,* That this section shall not be held to extend to the transmission by mail of newspapers from a known office of publication to *bonâ fide* subscribers, not exceeding one copy to each subscriber, nor to franked matter, to and from the intermediate points between the boundaries above named, at the usual rates;



*Provided, further,* That such franked matter shall be subject to such regulations as to its transmission and delivery as the postmaster-general shall prescribe.

SEC. 5. *And be it further enacted,* That the postmaster-general may, if he shall deem it for the public interests, enter into contracts, for any period not exceeding one year, for the transportation of the mails in steamships, by sea, between any of the ports in the United States; and that the sea-service already performed by his order on the Atlantic coast and Gulf of Mexico be paid for out of any moneys appropriated for the service of the post-office department. Also for such service already performed upon the Pacific coast a sum not exceeding fifteen hundred dollars, to be paid for out of any moneys appropriated for the service of the post-office department.

SEC. 6. *And be it further enacted,* That if any person or persons shall paint, print, post, or in any other manner place upon, or attach to, any steamboat or other vessel, or any stage-coach or other vehicle, which steamboat or other vessel, or stage-coach or other vehicle, is not actually used in carrying the mails of the United States, the words "United States mail," or any other words, letters, or characters of like import; or if any person or persons shall give notice, either by publishing in any newspaper or otherwise, that any steamboat or other vessel, or any stage-coach or other vehicle, is used in carrying the mails of the United States, when the same is not actually so used, every person so offending or wilfully aiding or abetting therein, shall, on conviction thereof in any court of competent jurisdiction, be fined in any sum not less than one hundred nor more than five hundred dollars for every such offence; one half for the use of the United States and the other half to the use of the person informing and prosecuting for the same.

SEC. 7. *And be it further enacted,* That the postmaster-general be, and he is hereby, authorized and empowered to suspend the operation of so much of the eighth section of the act of the thirty-first of August, eighteen hundred and fifty-two, as authorizes the conveyance of letters otherwise than in the mails on any such mail routes as in his opinion the public interest may require.

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ACT OF 1864, CHAPTER 70 (13 U. S. Stats. at Large, 61).

*An Act to provide for the Collection of Hospital Dues from Vessels of the United States sold or transferred in foreign Ports or Waters.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in case of the sale or trans-

fer of any vessel of the United States in a foreign port or water, the consul, vice-consul, commercial agent, or vice-commercial agent of the United States within whose consulate or district such sale or transfer shall have been made, or in whose hands the papers of such vessel shall be, be, and he is hereby, authorized and required to collect of the master or agent of such vessel all moneys that shall have become due to the United States under and by virtue of the act entitled "An act for the relief of sick and disabled seamen," approved July sixteenth, seventeen hundred and ninety-eight, and shall remain unpaid at the time of such sale or transfer; and that the said consul, vice-consul, commercial agent, or vice-commercial agent (as the case may be) be, and he is hereby, instructed and required to retain possession of the papers of such vessel until such money shall have been paid as herein provided: and in default of which, such sale or transfer shall be void, excepting as against the vendor; *Provided*, That this act shall not take effect until the expiration of sixty days from and after its passage.

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ACT OF 1864, CHAPTER 78 (13 U. S. Stats. at Large, 63).

*An Act for the Prevention and Punishment of Frauds in Relation to the Names of Vessels.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That every steamboat of the United States shall, in addition to having her name painted on her stern, as now required by law, also have the same conspicuously placed in distinct, plain letters, of not less than six inches in length, on each outer side of the pilot-house, if it has such, and (in case the said boat has side-wheels) also on the outer side of each wheel-house; and if any such steamboat shall be found without having her name placed as herein required, she shall be subject to the same penalty and forfeiture as is now provided by law in the case of a vessel of the United States found without having her name and the name of the port to which she belongs painted on her stern, as required by law.

SEC. 2. *And be it further enacted*, That no master, owner, or agent of any vessel of the United States shall in any way change the name of such vessel, or, by any device, advertisement, or contrivance, deceive, or attempt to deceive, the public, or any officer or agent of the United States Government or of any State, or any corporation or agent thereof, or any person or persons as to the true name of such vessel, on pain of the forfeiture of such vessel: *Provided*, That this act shall not take effect until the expiration of sixty days from and after its passage.

## ACT OF 1864, CHAPTER 83 (13 U. S. Stats. at Large, 69).

*An Act to regulate the Admeasurement of Tonnage of Ships and Vessels of the United States.*<sup>1</sup>

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That every ship or vessel built within the United States, or that may be owned by a citizen or citizens thereof, on or after the first day of January, eighteen hundred and sixty-five, shall be measured and registered in the manner hereinafter provided; also every ship or vessel that is now owned by a citizen or citizens of the United States shall be remeasured and re-registered upon her arrival after said day at a port of entry in the United States, and prior to her departure therefrom, in the same manner as hereinafter described: *Provided,* That any ship or vessel built within the United States after the passage of this act may be measured and registered in the manner herein provided.

SEC. 2. *And be it further enacted,* That the register of every vessel shall express her length and breadth, together with her depth and the height under the third or spar deck, which shall be ascertained in the following manner: The tonnage-deck in vessels having three or more decks to the hull shall be the second deck from below; in all other cases the upper deck of the hull is to be the tonnage-deck. The length from the forepart of the outer planking, on the side of the stem, to the afterpart of the main sternpost of screw steamers, and to the afterpart of the rudderpost of all other vessels measured on the top of the tonnage-deck, shall be accounted the vessel's length. The breadth of the broadest part on the outside of the vessel shall be accounted the vessel's breadth of beam. A measure from the under side of tonnage-deck plank, amidships, to the ceiling of the hold (average thickness) shall be accounted the depth of hold. If the vessel has a third deck, then the height from the top of the tonnage-deck plank to the under side of the upper-deck plank shall be accounted as the height under the spar-deck. All measurement to be taken in feet and fractions of feet; and all fractions of feet shall be expressed in decimals.

SEC. 3. *And be it further enacted,* That the register tonnage of a vessel shall be her entire internal cubical capacity in tons of one hundred cubic feet each, to be ascertained as follows: Measure the length of the vessel in a straight line along the upper side of the tonnage-deck, from the inside of the inner plank (average thickness), at the side of the stem to the inside of the plank on the stern timbers (average thickness), deducting from this length what is due to the rake of the bow in the thickness of the deck, and what is due to the rake of the stern-timber in the thickness of the deck, and

<sup>1</sup> See act of 1865, c. 70.

also what is due to the rake of the stern-timber in one third of the round of the beam; divide the length so taken into the number of equal parts required by the following table, according to the class in such table to which the vessel belongs:—

## TABLE OF CLASSES.

Class 1.—Vessels of which the tonnage length according to the above measurement is fifty feet or under, into six equal parts.

Class 2.—Vessels of which the tonnage length according to the above measurement is above fifty feet, and not exceeding one hundred feet long, into eight equal parts.

Class 3.—Vessels of which the tonnage length according to the above measurement is above one hundred feet long, and not exceeding one hundred and fifty feet long, into ten equal parts.

Class 4.—Vessels of which the tonnage length according to the above measurement is above one hundred and fifty feet, and not exceeding two hundred feet long, into twelve equal parts.

Class 5.—Vessels of which the tonnage length according to the above measurement is above two hundred feet, and not exceeding two hundred and fifty feet long, into fourteen equal parts.

Class 6.—Vessels of which the tonnage length according to the above measurement is above two hundred and fifty feet long, into sixteen equal parts.

Then, the hold being sufficiently cleared to admit of the required depths and breadths being properly taken, find the transverse area of such vessel at each point of division of the length as follows:—

Measure the depth at each point of division from a point at a distance of one third of the round of the beam below such deck, or, in case of a break, below a line stretched in continuation thereof, to the upper side of the floor-timber, at the inside of the limber-strake, after deducting the average thickness of the ceiling, which is between the bilge-planks and limber-strake; then, if the depth at the midship division of the length do not exceed sixteen feet, divide each depth into four equal parts; then measure the inside horizontal breadth, at each of the three points of division, and also at the upper and lower points of the depth, extending each measurement to the average thickness of that part of the ceiling which is between the points of measurement; number these breadths from above (numbering the upper breadth one, and so on down to the lowest breadth); multiply the second and fourth by four, and the third by two; add these products together, and to the sum add the first breadth and the last, or fifth; multiply the quantity thus obtained by one third of the common interval between the breadths, and the product shall be deemed the transverse area; but if the midship depth exceed sixteen feet, divide each

depth into six equal parts, instead of four, and measure, as before directed, the horizontal breadths at the five points of division, and also at the upper and lower points of the depth; number them from above as before; multiply the second, fourth, and sixth, by four, and the third and fifth by two; add these products together, and to the sum add the first breadth and the last, or seventh; multiply the quantities thus obtained by one third of the common interval between the breadths, and the product shall be deemed the transverse area.

Having thus ascertained the transverse area at each point of division of the length of the vessel, as required above, proceed to ascertain the register tonnage of the vessel in the following manner:—

Number the areas successively one, two, three, &c., number one being at the extreme limit of the length at the bow, and the last number at the extreme limit of the length at the stern; then whether the length be divided according to table, into six or sixteen parts, as in classes one and six, or any intermediate number, as in classes two, three, four, and five, multiply the second, and every even-numbered area by four, and the third and every odd-numbered area (except the first and last) by two; add these products together, and to the sum add the first and last, if they yield anything; multiply the quantities thus obtained by one third of the common interval between the areas, and the product will be the cubical contents of the space under the tonnage-deck; divide this product by one hundred, and the quotient, being the tonnage under the tonnage-deck, shall be deemed to be the register tonnage of the vessel, subject to the additions hereinafter mentioned.

If there be a break, a poop, or any other permanent closed-in space on the upper decks, on the spar-deck, available for cargo, or stores, or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained as follows:—

Measure the internal mean length of such space in feet, and divide it into an even number of equal parts of which the distance asunder shall be most nearly equal to those into which the length of the tonnage-deck has been divided; measure at the middle of its height the inside breadths, namely, one at each end and at each of the points of division, numbering them successively one, two, three, &c.; then to the sum of the end breadths add four times the sum of the even-numbered breadths and twice the sum of the odd-numbered breadths, except the first and last, and multiply the whole sum by one third of the common interval between the breadths; the product will give the mean horizontal area of such space; then measure the mean height between the planks of the decks, and multiply by it the mean horizontal area; divide the product by one hundred, and the quotient shall be deemed to be the tonnage of such space, and

shall be added to the tonnage under the tonnage-decks, ascertained as aforesaid.

If a vessel has a third deck, or spar-deck, the tonnage of the space between it and the tonnage-deck shall be ascertained as follows :—

Measure in feet the inside length of the space, at the middle of its height, from the plank at the side of the stem to the plank on the timbers at the stern, and divide the length into the same number of equal parts into which the length of the tonnage-deck is divided ; measure (also at the middle of its height) the inside breadth of the space at each of the points of division, also the breadth of the stem and the breadth at the stern ; number them successively one, two, three, and so forth, commencing at the stem ; multiply the second, and all other even-numbered breadths by four, and the third, and all the other odd-numbered breadths (except the first and last) by two ; to the sum of these products add the first and last breadths ; multiply the whole sum by one third of the common interval between the breadths, and the result will give, in superficial feet, the mean horizontal area of such space ; measure the mean height between the plank of the two decks, and multiply by it the mean horizontal area, and the product will be the cubical contents of the space ; divide this product by one hundred, and the quotient shall be deemed to be the tonnage of such space, and shall be added to the other tonnage of the vessel, ascertained as aforesaid. And if the vessel has more than three decks, the tonnage of each space between decks, above the tonnage-deck, shall be severally ascertained in the manner above described, and shall be added to the tonnage of the vessel, ascertained as aforesaid.

In ascertaining the tonnage of open vessels, the upper edge of the upper strake is to form the boundary line of measurement, and the depth shall be taken from an athwartship line, extending from upper edge of said strake at each division of the length.

The register of the vessel shall express the number of decks, the tonnage under the tonnage-deck, that of the between-decks, above the tonnage-deck ; also that of the poop or other enclosed spaces above the deck, each separately. In every registered United States ship or vessel the number denoting the total registered tonnage shall be deeply carved or otherwise permanently marked on her main beam, and shall be so continued ; and if it at any time cease to be so continued, such vessel shall no longer be recognized as a registered United States vessel.

SEC. 4. *And be it further enacted*, That the charge for the measurement of tonnage and certifying the same shall not exceed the sum of one dollar and fifty cents for each transverse section under the tonnage-deck ; and the sum of three dollars for measuring each between-decks above the tonnage-deck ; and the sum of one dollar and fifty cents for each poop, or

closed-in space available for cargo or stores, or for the berthing or accommodation of passengers, or officers and crew above the upper or spar deck.

SEC. 5. *And be it further enacted*, That the provisions of this act shall not be deemed to apply to any vessel not required by law to be registered, or enrolled, or licensed, and all acts and parts of acts inconsistent with the provisions of this are hereby repealed.

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ACT OF 1864, CHAPTER 113 (13 U. S. Stats. at Large, 120).

*An Act to create an additional supervising Inspector of Steamboats and two local Inspectors of Steamboats for the Collection District of Memphis, Tennessee, and two local Inspectors for the Collection District of Oregon, and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there shall be designated and appointed, in the mode prescribed by law, and who shall be paid the same annual compensation as is now paid, one additional supervising inspector of steamboats, and two local inspectors of steamboats, at Portland, in the collection district of Oregon, and two for the collection district of Memphis, Tennessee, at an annual compensation of seven hundred dollars, to be paid as provided by law, as in case of other like inspectors; and said inspectors shall perform the duties and be subject to the provisions of the steamboat act of August thirtieth, eighteen hundred and fifty-two.

SEC. 2. *And be it further enacted*, That so much of said act as provides for the appointment of two local inspectors of steamboats in the district of Wheeling, on the Ohio River, and for their compensation, is hereby repealed.

SEC. 3. *And be it further enacted*, That each engineer and pilot, licensed according to the provisions of said act, shall pay for every certificate granted by any inspector or inspectors, the sum of ten dollars, to be accounted for in the mode provided by law.

SEC. 4. *And be it further enacted*, That the forty-second section of the act of August thirty, eighteen hundred and fifty-two, be so construed as to require the inspection of the hull and boiler, in the manner prescribed by that act, of every vessel propelled in whole or in part by steam, and engaged as a ferry-boat, tug or towing-boat, or canal-boat, in all cases where, under the laws of the United States, such vessels may be engaged in the commerce with foreign nations, or among the several States.

SEC. 5. *And be it further enacted*, That all engineers and pilots of ferry-boats, tug-boats, towing-boats, or canal-boats, subject to inspection by this act, shall be classified and licensed in the same manner as are pilots and engineers by said act of August thirty, eighteen hundred and fifty-two.

SEC. 6. [Repealed 1865, Chapter 94.]

SEC. 7. *And be it further enacted*, That all parts of the act aforesaid, which are suspended by or are inconsistent with this act, are hereby repealed.

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ACT OF 1864, CHAPTER 116 (13 U. S. Stats. at Large, 121).

*An Act to provide for the Execution of Treaties between the United States and foreign Nations respecting consular Jurisdiction over the Crews of Vessels of such foreign Nations in the Waters and Ports of the United States.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in all cases where it may have been or shall hereafter be stipulated by treaty or convention between the United States and any foreign nation to the effect that the consul-general, consuls, vice-consuls, or consular or commercial agents of the two nations, respectively, shall have exclusive jurisdiction of controversies, difficulties, or disorders arising at sea or in the waters or ports of the one nation, between the master or other officer or officers and any of the crew, or between any of these last themselves, of any ship or vessel belonging to the other nation, such stipulations shall be executed and enforced within the jurisdiction of the United States as hereinafter declared: *Provided*, That before this act shall take effect as to the ships and vessels of any particular nation having such treaty with the United States, the President of the United States shall have been satisfied that similar provisions have been made for the execution of such treaty by the other contracting party, and shall have issued his proclamation to that effect, declaring this act to be in force as to such nation.

SEC. 2. *And be it further enacted*, That in all cases within the purview of this act the consul-general, consul, or other consular or commercial authority of such foreign nation charged with the appropriate duty in the particular case, may make application to any court of record of the United States, or any judge thereof, or to any commissioner appointed under the laws of the United States, to take bail or affidavits, or for other judicial purposes whatsoever, setting forth that such controversy, difficulty, or disorder has arisen, briefly stating the nature thereof, and when and where the same occurred, and exhibiting a certified copy or extract of the shipping-articles, roll, or other proper paper of the ship or vessel, to the effect that the person in question is of the crew or ship's company of such ship or vessel; and further stating and certifying that such person has withdrawn himself, or is believed to be about to withdraw himself, from the control and discipline of the master and officers of the said ship or vessel, or that he has refused, or is about to refuse, to submit to and obey the lawful juris-



diction of such consular or commercial authority in the premises; and further stating and certifying that, to the best of the knowledge and belief of the officer certifying, such person is not a citizen of the United States, and thereupon such judge, commissioner, or other judicial officer, on inspection of such application, the same being in writing and duly authenticated by the consular or other sufficient official seal, shall issue his warrant for the arrest of the person so complained of, directed to the marshal of the United States for the appropriate district, or in his discretion to any person, being a citizen of the United States, whom he may specially depute for the purpose, requiring such person to be brought before him for examination at a certain time and place. And if, on such examination, it shall be made to appear that the person so arrested is a citizen of the United States, he shall be forthwith discharged from arrest, and shall be left to the ordinary course of law. But if this shall not be made to appear, and such judge, commissioner, or other judicial authority shall find, upon the papers hereinbefore referred to, a sufficient *prima facie* case that the matter concerns only the internal order and discipline of such foreign ship or vessel, or, whether in its nature civil or criminal, does not *effect* [affect] directly the execution of the laws of the United States, or the rights and duties of any citizen of the United States, he shall forthwith, by his warrant, commit such person to prison, where prisoners under sentence of a court of the United States may be lawfully committed, or to the master or chief officer of such foreign ship or vessel, in his discretion, to be subject to the lawful orders, control, and discipline of the master or chief officer for the time being, of such ship, and to the jurisdiction of the consular or commercial authority of the nation to which such ship or vessel may belong, to the exclusion of any authority or jurisdiction in the premises of the United States or any State thereof: *Provided, nevertheless*, That the expenses of the arrest and the detention of the person so arrested shall be paid by the consul-general, consuls, or vice-consuls: *And provided, further*, That no person shall be detained more than two months after his arrest, but at the end of that time shall be set at liberty and shall not again be arrested for the same cause.

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ACT OF 1864, CHAPTER 121 (13 U. S. Stats. at Large, 124).

*An Act to provide for the summary Trial of Minor Offences against the Laws of the United States.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That it shall be lawful for the judge of any district court of the United States to hold a special session of said court at any time, whether in term or vacation, for the trial

of minor offences against the laws of the United States, as hereinafter provided.

SEC. 2. *And be it further enacted*, That whenever a complaint shall be made against any master, officer, or mariner of any ship or vessel belonging, in whole or in part, to any citizen or citizens of the United States, of the commission of any offence, not capital or otherwise infamous, against any law of the United States made for the protection of persons or property engaged in commerce or navigation, it shall be the duty of the district attorney to investigate the same, and the general nature thereof, and if, in his opinion, the case is such as should be summarily tried under the provisions of this act, he shall report the same to the district judge, and the judge shall forthwith, or as soon as the ordinary business of the court will permit, proceed to try the cause, and for that purpose may, if necessary, hold a special session of the court.

SEC. 3. *And be it further enacted*, That at such trial it shall not be necessary that the accused shall have been previously indicted, but a statement of complaint, verified by oath, in writing, shall be presented to the court, setting out the offence in such manner as clearly to apprise the accused of the character of the offence complained of, and to enable him to answer the complaint. And the said complaint or statement shall be read to the accused, who may plead to or answer the same, or make a counter-statement.

SEC. 4. *And be it further enacted*, That the said trial shall thereupon be proceeded with in a summary manner, and the case shall be decided by the court, unless, at the time for pleading or answering, the accused shall demand a jury, in which case the trial shall be upon the complaint and plea of not guilty.

SEC. 5. *And be it further enacted*, That it shall not be lawful for the court to sentence any person convicted on such trial to any greater punishment than imprisonment in jail for one year, or to a fine exceeding five hundred dollars, or both, in its discretion, in those cases where the laws of the United States authorize such imprisonment and fine.

SEC. 6. *And be it further enacted*, That it shall be lawful for the court to allow the district attorney to amend his statement or complaint at any stage of the proceedings, before verdict, if, in the opinion of the court, such amendment will work no injustice to the accused; and if it appear to the court that the accused is unprepared to meet the charge as amended, and that an adjournment of the cause will promote the ends of justice, such adjournment shall be made until a further day, to be fixed by the court.

SEC. 7. *And be it further enacted*, That at such trial, if by jury, the United States and the accused shall each be entitled to three peremptory

challenges. Challenges for cause, in such cases, shall be tried by the court without the aid of triers.

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ACT OF 1864, CHAPTER 130 (13 U. S. Stats. at Large, 134).

*An Act to regulate the foreign Coasting Trade on the Northern, Northeastern, and Northwestern Frontiers of the United States, and for other Purposes.*

SECTION 1: *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any boat, sloop, or other vessel of the United States, navigating the waters on our northern, northeastern, and northwestern frontiers, otherwise than by sea, shall be enrolled and licensed in such form as other vessels; which enrolment and license shall authorize any such boat, sloop, or other vessel to be employed either in the coasting or foreign trade on said frontiers; and no certificate of register shall be required for vessels so employed on said frontiers: *Provided,* That such boat, sloop, or vessel shall be, in every other respect, liable to the rules, regulations, and penalties now in force relating to registered and licensed vessels.

SEC. 7. *And be it further enacted,* That the act entitled "An act to regulate the foreign and coasting trade on the northern, northeastern, and northwestern frontiers of the United States, and for other purposes," approved second March, eighteen hundred and thirty-one, and all other acts or parts of acts inconsistent with this act be, and the same are hereby, repealed.

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ACT OF 1864, CHAPTER 170 (13 U. S. Stats. at Large, 201).

*An Act repealing certain Provisions of Law, concerning Seamen on board public and private Vessels of the United States.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That so much of an act entitled "An act for the regulation of seamen on board the public and private vessels of the United States," approved the third of March, one thousand eight hundred and thirteen, as makes it not lawful to employ on board any of the public or private vessels of the United States any person or persons except citizens of the United States or person[s] of color, natives of the United States; and so much of the third, fifth, sixth, and seventh sections of "An act concerning the navigation of the United States," approved the first of March, one thousand eight hundred and seventeen, as concerns the crews of vessels therein named; and so much of the first section of an act entitled "An act to repeal the tonnage duties upon ships and vessels of the United States and upon certain foreign vessels," approved the thirty-first

of May, one thousand eight hundred and thirty, as makes discrimination in favor of vessels certain proportions of whose crews shall be citizens of the United States, shall be, and the same are hereby, repealed; *Provided, however,* That officers of vessels of the United States shall in all cases be citizens of the United States.

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ACT OF 1864, CHAPTER 174 (13 U. S. Stats. at Large, 306).

*An Act to regulate Prize Proceedings and the Distribution of Prize Money, and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That it shall be the duty of the commanding officer of any vessel or vessels making a capture to secure the documents of the ship and cargo, including the log-book, with all other documents, letters, and other papers found on board, and make an inventory of the same, and seal them up, and send them, with the inventory, to the court in which proceedings are to be had, with a written statement that they are all the papers found, and in the condition in which they were found, or explaining the absence of any documents or papers, or any change in their condition. He shall send to said court, as witnesses, the master, one or more of the other officers, the supercargo, purser, or agent of the prize, and any person found on board whom he may suppose to be interested in, or to have knowledge respecting, the title, national character, or destination of the prize. He shall send the prize, with the documents, papers, and witnesses, under charge of a competent prize master and prize crew, into port for adjudication, explaining the absence of any usual witnesses; and in the absence of instructions from superior authority as to the port to which it shall be sent, he shall select such port as he shall deem most convenient in view of the interests of probable claimants, as well as of the captors. If the captured vessel, or any part of the captured property, is not in condition to be sent in for adjudication, a survey shall be had thereon and an appraisement made by persons as competent and impartial as can be obtained, and their reports shall be sent to the court in which proceedings are to be had; and such property, unless appropriated for the use of the government, shall be sold by the authority of the commanding officer present, and the proceeds deposited with the assistant treasurer of the United States most accessible to said court, and subject to its order in the cause.

SEC. 2. *And be it further enacted,* That if any vessel of the United States shall claim to share in the prize, either as having made the capture, or as having been within signal distance of the vessel or vessels making the capture, the commanding officer of such vessel shall make out a written

statement of his claim, with the grounds on which it is rested, the principal facts tending to show what vessels made the capture, and what vessels were within signal distance of those making the capture, with reasonable particularity as to times, distances, localities, and signals made, seen, or answered; and such statement of claim shall be signed by him and sent to the court in which proceedings shall be had, and shall be filed in the cause.

SEC. 3. *And be it further enacted*, That it shall be the duty of the prize master to make his way diligently to the selected port, and there immediately deliver to a prize commissioner the documents and papers, and the inventory thereof, and make affidavit that they are the same and in the same condition as delivered to him, or explaining any absence or change of condition therein, and that the prize property is in the same condition as delivered to him, or explaining any loss or damage thereto; and he shall further report to the district attorney, and give to him all the information in his possession respecting the prize and her capture; and he shall deliver over the persons sent as witnesses to the custody of the marshal, and shall retain the prize in his custody until it shall be taken therefrom by process from the prize court.

SEC. 4. *And be it further enacted*, That the attorney of the United States for the district shall immediately file a libel against such prize property, and shall forthwith obtain a warrant from the court directing the marshal to take it into his custody, and shall proceed diligently to obtain a condemnation and distribution thereof, and to that end shall see that the proper preparatory evidence is taken by the prize commissioners, and that the prize commissioners also take the depositions *de bene esse* of the prize crew and other transient persons cognizant of any facts bearing on condemnation or distribution. It shall also be the duty of the district attorney to represent the interests of the United States in all prize causes, and he shall not act as separate counsel for the captors on any private retainer or compensation from them, unless in a question between the claimants and the captors on a demand for damages. The district attorney shall examine all fees, costs, and expenses, sought to be charged on the prize fund, and protect the interests of the captors and of the United States. The district attorneys of all districts in which any prize causes are or may be pending, shall, as often as once in three months, send to the secretary of the navy a statement of the condition of all prize causes pending in their districts, in such form and embracing such particulars as the secretary of the navy shall require.

SEC. 5. *And be it further enacted*, That any district court may appoint prize commissioners, not exceeding three in number, of whom one shall be a retired naval officer, approved by the secretary of the navy, who shall

receive no other compensation than his pay in the navy, and who shall protect the interests of the captors and of the department of the navy in the prize property, and at least one of the others shall be a member of the bar of the court, of not less than three years' standing, and acquainted with the taking of depositions.

SEC. 6. *And be it further enacted*, That the prize commissioners, or one of them, shall receive from the prize master the documents and papers, and inventory thereof, and shall take the affidavit of the prize master heretofore required, and shall forthwith take the testimony of the witnesses sent in, separate from each other, on interrogatories prescribed by the court, in the manner usual in prize courts; and the witnesses shall not be permitted to see the interrogatories, documents, or papers, or to consult with counsel, or with any persons interested, without special authority from the court; and the witnesses who have the rights of neutrals shall be discharged as soon as practicable. The prize commissioners shall also take depositions *de bene esse* of the prize crew and others, at the request of the district attorney, on interrogatories prescribed by the court. They shall also, as soon as any prize property comes within the district for adjudication, examine the same, and make an inventory thereof, founded on an actual examination, and report to the court whether any part of it is in a condition requiring immediate sale for the interests of all parties, and notify the district attorney thereof; and if it be necessary to the examination or making of the inventory that the cargo be unladen, they shall apply to the court for an order to the marshal to unlade the same, and shall, from time to time; report to the court anything relating to the condition of the property, or its custody or disposal, which may require any action by the court, but the custody of the property shall be only in the marshal. They shall also seasonably return into court, sealed and secured from inspection, the documents and papers which shall come to their hands, duly scheduled and numbered, and the other preparatory evidence, and the evidence taken *de bene esse*, and their own inventory of the prize property; and if the captured vessel, or any of its cargo or stores, are such that, in their judgment, may be useful to the government in war, they shall report the same to the secretary of the navy.

SEC. 7. *And be it further enacted*, That the marshal shall safely keep all prize property under warrant from the court, and shall report to the court any cargo or other property that he thinks requires to be unladen and stored, or to be sold. He shall insure prize property if, in his judgment, it is for the interest of all concerned. He shall keep in his custody all persons found on board a prize and sent in as witnesses, until they are released by the prize commissioners or the court. If a sale of property is ordered, he shall sell the same in the manner required by the court,

and collect the purchase-money, and forthwith deposit the gross proceeds of the sales with the assistant treasurer of the United States nearest the place of sale, subject to the order of the court in the particular cause ; and each marshal shall forward to the secretary of the navy, whenever and as often as he may require it, a full statement of the condition of each prize and of the disposition made thereof.

SEC. 8. *And be it further enacted*, That, whenever any prize property shall be condemned, or shall at any stage of the proceedings be found by the court to be perishing, perishable, or liable to deteriorate or depreciate, or whenever the costs of keeping the same shall be disproportionate to its value, it shall be the duty of the court to order a sale thereof ; and whenever, after the return day on the libel, all the parties in interest who have appeared in the cause shall agree thereto, the court is authorized to make such order, and no appeal shall operate to prevent the making or execution of such order. The secretary of the navy shall employ an auctioneer or auctioneers of known skill in the branch of business to which any sale pertains, to make the sale, but the sale shall be conducted under the supervision of the marshal, and the collecting and depositing of the gross proceeds shall be by the auctioneer or his agent. Before any sale the marshal shall cause full catalogues and schedules to be prepared and circulated, and a copy of each shall be returned by the marshal to the court in each cause. The marshal shall cause sales to be advertised fully and conspicuously in newspapers ordered by the court, and by posters, and he shall, at least five days before the sale, serve notice thereof upon the naval prize commissioner, and the goods shall be open to inspection at least three days before the sale.

SEC. 9. *And be it further enacted*, That in case a decree of condemnation shall be rendered, the court shall consider the claims of all vessels to participate in the proceeds, and for that purpose shall, at as early a stage of the cause as possible, order testimony to be taken tending to show what part should be awarded to the captors, and what vessels are entitled to share, and such testimony may be sworn to before any judge or commissioner of the courts of the United States, consul, or commercial agent of the United States, or notary-public, or any officer of the navy highest in rank, reasonably accessible to the deponent. The court shall make a decree of distribution, determining what vessels are entitled to share in the prize, and whether the prize was of superior, equal, or inferior force to the vessel or vessels making the capture. And said decree shall recite the amount of the gross proceeds of the prize subject to the order of the court, and the amount deducted therefrom for costs and expenses, and the amount remaining for distribution, and whether the whole of such residue is to go to the captors, or one half to the captors, and one half to the United States.

SEC. 10. *And be it further enacted*, That the net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; and when of inferior force, one half shall be decreed to the United States and the other half to the captors: *Provided*, That in case of privateers and letters-of-marque, the whole shall be decreed to the captors, unless it shall be otherwise provided in the commissions issued to such vessels. All vessels of the navy within signal distance of the vessel or vessels making the capture, under such circumstances and in such condition as to be able to render effective aid, if required, shall share in the prize; and in case of vessels not of the navy, none shall be entitled to share except the vessel or vessels making the capture, in which term shall be included vessels present at the capture and rendering actual assistance in the capture. All prize money adjudged to the captors shall be distributed in the following proportions, namely: —

First. To the commanding officer of a fleet or squadron, one twentieth part of all prize money awarded to any vessel or vessels under his immediate command.

Second. To the commanding officer of a division of a fleet or squadron, on duty under the orders of the commander-in-chief of such fleet or squadron, a sum equal to one fiftieth part of any prize money awarded to a vessel of such division for a capture made while under his command, the said fiftieth part to be deducted from the moiety due to the United States, if there be such moiety, otherwise from the amount awarded to the captors: *Provided*, That such fiftieth part shall not be in addition to any share which may be due to the commander of the division, and which he may elect to receive, as commander of a single ship making or assisting in the capture.

Third. To the fleet-captain, one hundredth part of all prize money awarded to any vessel or vessels of the fleet or squadron in which he is serving, except in a case where the capture is made by the vessel on board of which he is serving at the time of such capture; and in such case he shall share, in proportion to his pay, with the other officers and men on board such vessel, as is hereinafter provided.

Fourth. To the commander of a single ship, one tenth part of all the prize money awarded to the ship under his command, if such ship at the time of the capture was under the command of the commanding officer of a fleet or squadron, or a division, and three twentieths, if his ship was acting independently of such superior officer.

Fifth. After the foregoing deductions, the residue shall be distributed and proportioned among all others doing duty on board (including the fleet captain), and borne upon the books of the ship, in proportion to their respective rates of pay in the service.



No commanding officer of a fleet or squadron shall be entitled to receive any share of prizes captured by any vessel or vessels not under his command, nor of such prizes as may have been captured by any ships or vessels intended to be placed under his command, before they have acted under his orders. Nor shall the commanding officer of a fleet or squadron, leaving the station where he had command, have any share in the prizes taken by ships left on such station after he has gone out of the limits of his said command, nor after he has transferred his command to his successor. No officer or other person who shall have been temporarily absent on duty from a vessel on the books of which he continued to be borne, while so absent, shall be deprived, in consequence of such absence, of any prize money to which he would otherwise be entitled. And he shall continue to share in the captures of the vessels to which he is attached until regularly discharged therefrom.

SEC. 11. *And be it further enacted*, That a bounty shall be paid by the United States for each person on board any ship or vessel of war belonging to an enemy at the commencement of an engagement, which shall be sunk or otherwise destroyed in such engagement by any ship or vessel belonging to the United States, or which it may be necessary to destroy in consequence of injuries sustained in action, of one hundred dollars, if the enemy's vessel was of inferior force, and of two hundred dollars, if of equal or superior force, to be divided among the officers and crew in the same manner as prize money; and when the actual number of men on board any such vessel cannot be satisfactorily ascertained, it shall be estimated according to the complement allowed to vessels of its class in the navy of the United States; and there shall be paid as bounty to the captors of any vessel of war captured from an enemy, which they may be instructed to destroy, or which shall be immediately destroyed for the public interest, but not in consequence of injuries received in action, fifty dollars for every person who shall be on board at the time of such capture. All ransom money, salvage, bounty, or proceeds of condemned property, accruing or awarded to any vessel of the navy, shall be distributed and paid to the officers and men entitled thereto in the same manner as prize money, under the direction of the secretary of the navy.

SEC. 12. *And be it further enacted*, That every assignment of prize or bounty money, or wages, due to persons enlisted in the naval service, and all powers of attorney, or other authority, to draw, receipt for, or transfer the same, shall be void, unless the same be attested by the captain, or other commanding officer, and the paymaster; and in case of any assignment of wages, the same shall specify the precise time when they commence. But the commanding officer of every vessel is required to discourage his crew from selling any part of their prize money or wages, and never to attest any

power of attorney until he is satisfied that the same is not granted in consideration of money given for the purchase of prize money or wages.

SEC. 13. *And be it further enacted*, That appeals from the district courts of the United States in prize causes shall be directly to the Supreme Court, and shall be made within thirty days of the rendering of the decree appealed from, unless the court shall previously have extended the time, for cause shown in the particular case, and the Supreme Court shall always be open for the entry of such appeals. Such appeals may be claimed whenever the amount in controversy exceeds two thousand dollars, and, in other cases, on the certificate of the district judge that the adjudication involves a question of general importance. Notwithstanding such appeal, the district court may make and execute all necessary orders for the custody and disposal of the prize property; and in case of appeal from a decree of condemnation, may still proceed to make a decree of distribution so far as to determine what share of the prize shall go to the captors, and what vessels are entitled to participate therein. Any prize cause now pending in any circuit court shall, on the application of all parties in interest, who have appeared in the cause, be transferred by that court to the Supreme Court; and such transfer may be made, in the discretion of the court, and on such terms as it may direct, on the application of any party: *Provided*, That if the amount in controversy does not exceed two thousand dollars, such transfer shall not be made unless the court shall certify that the adjudication involves a question of general importance. All appeals to the Supreme Court from the circuit court in prize causes, now remaining therein, shall be claimed and allowed in the same manner as in cases of appeal from the district court to the Supreme Court. In any case of appeal or transfer, the court below, or the appellate court, may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof.

SEC. 14. *And be it further enacted*, That all costs and all expenses incident to the bringing in, custody, preservation, insurance, sale, or other disposal of prize property, when allowed by the court, shall be a charge upon the same, and be paid therefrom, unless the court shall decree restitution free from such charge. No payments shall be made from any prize fund, except upon the order of the court. All charges for work and labor, materials furnished, or money paid, shall be supported by affidavit or vouchers. The court may, at any time, order the payment, from the deposit made with the assistant treasurer in the cause, of any costs or charges accrued and allowed. When the cause is finally disposed of, the court shall make its order or orders on the assistant treasurer to pay the costs and charges allowed and unpaid; and in case the final decree shall be for restitution, or in case there shall be no money subject to the order of the court in the

cause, any costs or charges allowed by the court, and not paid by the claimants, shall be a charge upon, and be paid out of, the fund for defraying the expenses of suits in which the United States is a party or interested.

SEC. 15. *And be it further enacted*, That the court may require any party, at any stage of the cause, and on claiming an appeal, to give security for costs.

SEC. 16. *And be it further enacted*, That the net amount decreed for distribution to the United States, or to vessels of the navy, shall be ordered by the court to be paid into the treasury of the United States, to be distributed according to the decree of the court. And the treasury department shall credit the navy department with each amount received to be distributed to vessels of the navy; and the persons entitled to share therein shall be severally credited in their accounts with the navy department with the amounts to which they are respectively entitled. In case of vessels not of the navy, the distribution shall be made by the court to the several parties entitled thereto, and the amounts decreed to them shall be divided between the owners and the ship's company, according to any written agreement between them, and in the absence of such agreement, one half to the owners and one half to the ship's company, according to their respective rates of pay on board; and the court may appoint a commissioner to make such distribution, subject to the control of the court, who shall make due return of his doings, with proof of actual payments by him, and who shall receive no other compensation, directly or indirectly, than such as shall be allowed him by the court: *Provided*, That in case of vessels not of the navy, but controlled by any department of the government, the whole amount decreed to the captors shall be divided among the ship's company.

SEC. 17. *And be it further enacted*, That the clerk of each district court shall render to the secretary of the treasury and the secretary of the navy a semi-annual statement, beginning with the first day of July next, of all the sums allowed by the court and ordered to be paid, within the previous half-year, to the district attorney and prize commissioners for services, and to marshals for fees and commissions; and he shall, in all prize causes in the district, for the purpose of the final decree of distribution, ascertain and keep an account of the amount deposited with the assistant treasurer, subject to the order of the court, in each prize cause, and the amounts ordered to be paid therefrom as costs and charges, and the residue for distribution; and shall send copies of all final decrees of distribution to the secretary of the treasury and the secretary of the navy; and shall draw the orders of the court for the payment of all costs and allowances, and for the distribution of the residue. And for the said services, he shall be entitled to receive the sum of twenty-five dollars in each prize cause, which shall be in full for the services required by this section.

SEC. 18. *And be it further enacted*, That the marshal shall be allowed his actual and necessary expenses for the custody, care, preservation, insurance, sale, or other disposal of the prize property, and for executing any order of the court respecting the same, and shall have a commission of one quarter of one per centum on vessels, and of one half of one per centum on all other prize property, calculated on the gross proceeds of each sale; and if, after he shall have had any prize property in his custody, and shall have actually performed labor and incurred responsibility for the care and preservation thereof, the same shall be taken by the United States for its own use without a sale, or if it shall be delivered on stipulation to the claimants, he shall, in case the same shall be condemned, be entitled to one half the above commissions on the amount deposited by the United States to the order of the courts, or collected upon the stipulation. No charges of the marshal for expenses or disbursements shall be allowed, except upon his oath that the same have been actually and necessarily incurred for the purpose stated.

SEC. 19. *And be it further enacted*, That neither the marshal nor the clerk shall be permitted to retain for all official services, of every kind, excepting those in prize causes, more than the maximum compensation allowed to be retained by him by the third section of the act of the twenty-sixth of February, eighteen hundred and fifty-three; nor shall the additional compensation which either of said officers shall be permitted to retain for all services, of every kind, in prize causes, exceed one half the maximum compensation allowed to them, respectively, by the aforesaid act.

SEC. 20. *And be it further enacted*, That the district attorney and prize commissioners, except the naval officer, shall be allowed a just and suitable compensation for their respective services in each prize cause, to be adjusted and determined by the court, and to be paid as costs in the cause.

SEC. 21. *And be it further enacted*, That each district attorney and prize commissioner, except the naval officer, shall render to the secretary of the interior an annual account, beginning with the first day of July next, of all sums he shall have received for all services in prize causes within the previous year; and the district attorney shall be allowed to retain therefrom a sum not exceeding three thousand dollars for each year, in addition to the maximum compensation allowed to be retained by him by the third section of the act of the twenty-sixth February, eighteen hundred and fifty-three, or in addition to any salary he may receive in lieu of such maximum compensation; and each such prize commissioner shall be allowed to retain a sum not exceeding three thousand dollars for each year, which shall be in full for all his official services in prize causes; and any excess over those respective amounts shall be paid by the officer receiving

the same into the treasury of the United States, and shall be credited to the fund for paying naval pensions.

SEC. 22. *And be it further enacted*, That the auctioneers employed to make sales of prize property shall be entitled to receive commissions by a scale to be established by the secretary of the navy, not to exceed, in any case, one half of one per centum on any sum exceeding ten thousand dollars on vessels, nor one per centum on said sum of other prize property, which shall be in full for his expenses, as well as their services; and in case no such scale shall be established, they shall be entitled to receive such compensation as the court shall deem just under the circumstances of each case.

SEC. 23. *And be it further enacted*, That in any case of capture heretofore made, or that may hereafter be made by vessels of the navy, the secretary of the navy may employ special counsel for captors, when, in his judgment, the services of such special counsel are needed in the particular case for the due protection of the interests of the captors and of the navy-pension fund; and under the direction of the secretary of the navy such counsel may institute and prosecute such proceedings in the case as may be necessary and proper for the protection of such interests. The court may allow such compensation as it shall deem just under the circumstances of each case to special counsel for captors, not being the district attorney or any of his assistants, whether appointed by a department of the government or by the captors, for services actually rendered in the cause, to be paid as costs, in whole or in part either from the entire fund or from the portion awarded to the captors; but no such allowance shall be made except for services rendered on matters as to which the party the counsel represents has an adverse interest to the United States, or an interest otherwise proper in the opinion of the court to be represented by special counsel, or for services rendered in a contestation between parties claiming to participate in the distribution of the proceeds.

SEC. 24. *And be it further enacted*, That fees of special counsel in prize cases incurred or authorized by any department of the government, or for the defence of captors against demands for damages made by claimants in the district court, not paid by claimants, nor from the prize fund in the particular cause, and audited and allowed by the department incurring or authorizing them, and by the solicitor of the treasury, shall be a charge, upon and paid out of, the funds appropriated for defraying the expenses of suits in which the United States is a party or interested.

SEC. 25. *And be it further enacted*, That whenever the court shall allow fees to any witness in a prize cause, or fees for taking evidence out of the district in which the court sits, and there is no money subject to its order in the cause, the same shall be paid by the marshal, and shall be repaid to him

from any money deposited to the order of the court in said cause ; and any amount not so repaid the marshal shall be allowed as witness fees paid by him in cases in which the United States is a party.

SEC. 26. *And be it further enacted*, That no prize property shall be delivered to the claimants on stipulation, deposit, or other security, except where there has been a decree of restitution and the captors have appealed therefrom, or where the court, after a full hearing on the preparatory proofs, has refused to condemn the property on those proofs, and has given the captors leave to take further proofs, or where the claimant of any property shall satisfy the court that the same has a peculiar and intrinsic value to him, independent of its market value. In any of these cases, the court may deliver the property on stipulation or deposit of its value, if it shall be satisfied that the rights and interests of the United States and captors, or of other claimants, will not be prejudiced thereby, a satisfactory appraisement being first made, with an opportunity given to the district attorney and naval prize commissioner to be heard as to the appointment of appraisers. And any money deposited in lieu of stipulation, and all money collected on a stipulation, not being costs, shall be deposited with the assistant treasurer in the same manner as proceeds of a sale.

SEC. 27. *And be it further enacted*, That whenever any captured vessel, arms, munitions, or other material shall be taken for the use of the government before it comes into the custody of a prize court, it shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained, and the survey, appraisement, and inventory shall be sent to the court in which proceedings are to be had ; and if taken afterwards, sufficient notice shall first be given to enable the court to have the property appraised for the protection of the rights of the claimants and captors. In all cases of prize property heretofore taken for, or appropriated to, the use of the government, or that shall hereafter be so taken or appropriated, the department for whose use it was or shall be taken or appropriated shall deposit the value thereof with the assistant treasurer of the United States nearest to the place of the session of the court, subject to the order of the court in the cause.

SEC. 28. *And be it further enacted*, That in case of any capture heretofore made, or that shall hereafter be made, if, by reason of its condition, or because the whole has been appropriated to the use of the United States, no part of the captured property has been or can be sent in for adjudication, or if the captured property be entirely lost or destroyed, proceedings for adjudication may be commenced in any district the secretary of the navy may designate. And in any such case the proceeds of any thing sold, or the value of anything taken or appropriated for the use of the government, shall be deposited with the assistant treasurer in or nearest

to that district, subject to the order of the court in the cause. If, when no property can be sent in for adjudication, the secretary of the navy shall not, within three months after any capture, designate a district for the institution of proceedings, the captors may institute proceedings for adjudication in any district. And if, in any case of capture, no proceedings for adjudication shall be commenced within a reasonable time, any parties claiming the captured property may, in any district court, as a court of prize, move for a monition to show cause why such proceedings shall not be commenced, or institute an original suit in such court for restitution, and the monition issued in either case shall be served on the attorney of the United States for the district, and on the secretary of the navy, as well as on such other persons as the court shall order to be notified.

SEC. 29. *And be it further enacted*, That when any vessel or other property shall have been captured by any force hostile to the United States, and shall be recaptured, and it shall appear to the court that the same had not been condemned as prize before its recapture, by any competent authority, the court shall award a meet and competent sum as salvage, according to the circumstances of each case; and if the captured property belonged to the United States, it shall be restored to the United States, and there shall be paid from the treasury of the United States the salvage, costs, and expenses ordered by the court; and if the recaptured property belonged to persons residing within or under the protection of the United States, the court shall adjudge the property to be restored to its owners upon their claim, on the payment of such sum as the court may award as salvage, costs, and expenses; and if the recaptured property belonged to any person permanently resident within the territory and under the protection of any foreign prince, government, or state in amity with the United States, and by the law or usage of such prince, government, or state, the property of a citizen of the United States would be restored under like circumstances of recapture, it shall be adjudged to be restored to such owner upon his claim, upon such terms as by the law or usage of such prince, government, or state would be required of a citizen of the United States under like circumstances of recapture; and when no such law or usage shall be known, it shall be adjudged to be restored upon the payment of such salvage, costs, and expenses as the court shall order: *Provided*, That nothing in this act shall be construed to contravene any treaty of the United States. And the whole amount awarded as salvage shall be decreed to the captors and no part to the United States, and shall be distributed as in the case of proceeds of property condemned as prize.

SEC. 30. *And be it further enacted*, That if it shall appear to the court, in the case of any prize property ordered to be sold, that it will be for the interest of all parties to have it sold in another district, the court may

direct the marshal to transfer the same to the district selected by the court for the sale, and to insure the same with proper orders as to the time and manner of selling the same. And it shall be the duty of the marshal so to transfer the property, and keep and sell the same in like manner as if the property were in his own district; and he shall deposit the gross proceeds of the sale with the assistant treasurer nearest to the place of sale, subject to the order of the court in which the adjudication thereon is pending; and the necessary expense attending the insuring, transferring, receiving, keeping, and selling the said property shall be a charge thereupon and upon the proceeds thereof; and whenever any such expense is paid in advance by the marshal, and he shall not be repaid from the proceeds, any amount not so repaid he shall be allowed as in case of expenses incurred in suits in which the United States is a party. The secretary of the navy may, in like manner, either by a general regulation or special direction in any cause, require a marshal to transfer any prize property from the district in which the judicial proceedings are pending to any other district for sale, and the same proceedings shall be had as if such transfer had been made by order of the court, as hereinbefore provided.

SEC. 31. *And be it further enacted*, That, if any person shall wilfully do any act, or aid, assist, or advise, in the doing of any act relating to the bringing in, custody, preservation, sale, or other disposition of any property captured as prize, or relating to any documents or papers connected with the property, or to any deposition or other document or paper connected with the proceedings, with intent to defraud, delay, or injure the United States, or any captor or claimant of such property, he shall, on conviction, be punished by a fine not exceeding ten thousand dollars, or by imprisonment not exceeding five years, or both, at the discretion of the court.

SEC. 32. *And be it further enacted*, That in the term "vessels of the navy" shall be included, for the purposes of this act, all armed vessels officered and manned by the United States, and under the control of the department of the navy.

SEC. 33. *And be it further enacted*, That the provisions of this act shall be applied to all captures made as prize by authority of the United States, or adopted and ratified by the President of the United States.

SEC. 34. *And be it further enacted*, That this act shall apply to all prize proceedings now pending.

SEC. 35. *And be it further enacted*, That the act entitled "An act providing for salvage in cases of recapture," approved on the third day of March, in the year eighteen hundred, and the act entitled "An act in addition to the act concerning letters-of-marque, prizes, and prize goods," approved on the twenty-seventh day of January, in the year eighteen hundred and thirteen, and the act entitled "An act in addition to an act entitled



an act in relation to the navy pension fund," approved on the sixteenth day of April, eighteen hundred and sixteen, and an act entitled "An act to facilitate judicial proceedings in adjudications upon captured property and for the better administration of the law of prize," approved on the twenty-fifth day of March, eighteen hundred and sixty-two, and the second, sixth, and twelfth sections of an act entitled "An act for the better government of the navy of the United States," approved on the seventeenth day of July, eighteen hundred and sixty-two, and the act entitled "An act further to regulate proceedings in prize cases and to amend various acts of Congress in relation thereto," approved on the third day of March, eighteen hundred and sixty-three, and all other acts and parts of acts, inconsistent herewith, are hereby repealed.

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ACT OF 1864, CHAPTER 249 (13 U. S. Stats. at Large, 390).

*An Act further to regulate the Carriage of Passengers in Steamships and other Vessels.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the term "contiguous territory," in the first section of the act entitled "An act to regulate the carriage of passengers in steamships and other vessels," approved March three, eighteen hundred and fifty-five, shall not be held to extend to any port or place connecting with any inter-oceanic route through Mexico.

SEC. 2. *And be it further enacted,* That the provisions of the eleventh section of said act be, and the same are hereby, extended to all vessels whose passengers, or any part of them, are or shall be bound from or to any of the ports or places therein mentioned, by way of any overland route or routes through Mexico or Central America.

SEC. 3. *And be it further enacted,* That hereafter there shall be delivered to masters or owners of vessels three copies of the inspectors' certificates directed to be given them by collectors or other chief officers of the customs, by the twenty-fifth section of the act entitled "An act to amend an act entitled 'An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam,' and for other purposes," approved August thirty, eighteen hundred and fifty-two, one of which copies shall be placed, and at all times kept, by said masters or owners, in some conspicuous place in the vessel, where it will be most likely to be discovered by steerage passengers, and the others as now provided by law; and the penalty for neglecting or refusing to place and keep up such additional copy shall be the same as is provided by the said twenty-fifth section in the other cases therein mentioned.

SEC. 4. *And be it further enacted*, That the list of passengers required to be kept by section thirty-five of the said act of August thirty, eighteen hundred and fifty-two, shall also be open to the inspection of any passenger during all reasonable hours ; and that after any clearance is granted, but before the vessel shall be allowed to depart, the master or other person in charge of such vessel, carrying passengers, shall file with the collector, or other officer of the customs granting the clearance, a list, verified by the oath of the master, or other agent, or owner of the vessel, of all passengers received, or to be received, on the vessel so cleared, for conveyance during the proposed voyage, designating cabin and *and* steerage passengers distinctly ; and on the receipt by such customs officer on the full list so verified, a departure permit shall be given, without which no vessel conveying passengers shall go to sea ; and such departure permit shall be shown to the pilot of each vessel before he shall have authority to take the vessel to sea ; and any pilot who shall, without such authority being shown to him, pilot a vessel to sea, shall be subject to a fine of one hundred dollars, and a revocation of his license.

SEC. 5. *And be it further enacted*, That the master or commander of any vessel carrying passengers from any port or ports in the United States to any port or place in Mexico or Central America shall, immediately on arriving at such last-mentioned port or place, deliver to the United States consul, vice-consul, or commercial agent at such port two copies of the list of passengers required to be kept on such vessel by said section thirty-five of the act of August thirty, eighteen hundred and fifty-two, embracing all the passengers on board the vessel at any time during its voyage up to its said arrival, and duly verified by the oath of such master or commander, and by the inspection of the consul, vice-consul, or commercial agent, previous to or at the landing of the passengers ; one of which copies the said consul, vice-consul, or commercial agent shall file in his office, and the other of which he shall transmit, without delay, to the collector of the port in the United States from which the vessel last cleared. And if such master or commander shall refuse or neglect to comply with the requirements of this section, or shall knowingly make a false return of the list of passengers, he, together with the owner or owners of said vessel, shall be subject to a fine of not less than ten thousand dollars, and such fine shall be a lien upon the vessel until paid.

SEC. 6. *And be it further enacted*, That the provisions of section twelve of the act entitled "An act to provide for the better security of the lives of passengers on board of vessels propelled in whole or in part by steam," approved July seventh, eighteen hundred and thirty-eight, be, and the same are hereby, extended to the owner or owners of any steamboat or other vessel propelled in whole or in part by steam, and to all public

officers, by, or in consequence of, whose fraud, connivance, misconduct, or violation of law, the life or lives of any person or persons on board such steamboat or vessel may be destroyed.

SEC. 7. *And be it further enacted*, That if the owner or owners, master, commander, or other person in charge of any steamboat or other vessel, shall wilfully present, or cause to be presented, any false or fraudulent list or lists of its passengers, or copies thereof, to any consul, vice-consul, commercial agent, collector, or other custom-house officer, or of the departure permit to any pilot, he or they shall be held guilty of misdemeanor, and on conviction thereof shall be imprisoned for a term not exceeding two years; and the vessel shall be liable to seizure and forfeiture.

SEC. 8. *And be it further enacted*, That the secretary of the treasury shall cause to be prepared a synopsis of such of the laws relating to the carriage of passengers, and their safety on vessels propelled in whole or in part by steam, as he shall think expedient, and have the same printed in convenient form to be framed under glass, and give to any such vessel two copies, on application of its owners or master, who shall, without unnecessary delay, have the same framed under glass, and place and keep them in conspicuous places in such vessel, in the same manner as is provided by law in regard to certificates of inspectors; and no clearance shall be issued to such vessel until the collector or other chief [officer] of the customs shall be satisfied that the provisions of this section shall have been complied with by such owners or master; and in case such owners or master shall neglect or refuse to comply with provisions of this section, he or they shall furthermore forfeit and pay for each offence one hundred dollars, and such fine shall be a lien upon the vessel until paid.

SEC. 9. *And be it further enacted*, That informers shall be entitled to one half of any penalty or fine collected under this act, or the said act of March third, eighteen hundred and fifty-five, upon their information.

SEC. 10. *And be it further enacted*, That all steamers and other vessels belonging to a citizen or to citizens of the United States, and bound from any port in the United States to any other port therein, or to any foreign port, or from any foreign port to any port in the United States, shall, before clearance, receive on board all such bullion, coin, United States notes and bonds and other securities as the government of the United States or any department thereof, or any minister, consul, vice-consul, or commercial or other agent of the United States abroad shall offer, and shall securely convey and promptly deliver the same to the proper authorities or consignees on arriving at the port of destination, and shall receive for such service such reasonable compensation as may be allowed to other carriers in the ordinary transactions of business.

## ACT OF 1865, CHAPTER 69 (13 U. S. Stats. at Large, 444).

*An Act relating to the Enrolment and License of certain Vessels.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That whenever it shall become necessary for the owner or owners of any vessel of the United States navigating the western rivers and the waters on the northern, northeastern, and northwestern frontiers of the United States otherwise than by sea, and being in a district other than that to which such vessel shall belong, to procure her enrolment and license, or license, or renewal thereof, the same proceedings may be had in the district in which said vessel then shall be, as are now, or shall then be required by law, on application for such enrolment and license, or license, or renewal thereof, as the case may be, in the district to which such vessel may belong, excepting the giving of bond and the enrolment and issuance of license; and the officer before whom such proceedings shall be had shall certify the same to the collector of the district to which such vessel shall belong, who shall thereupon, on the said owner or owners giving bond as required in other cases, duly enrol the said vessel and issue license in the same form as if the application had originally been made in his office; and either deliver the said license to said owner or owners, or forward it by mail to the officer who certified to him the preliminary proceedings, and who shall, in such case, deliver the said license to the owner or owners or master of the vessel: *Provided*, That this act shall not be construed so as in any respect to change existing laws, excepting in so far as it enable such owners to procure enrolment or license, or renewal thereof, without returning their vessels to their home ports or districts.

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## ACT OF 1865, CHAPTER 70 (13 U. S. Stats. at Large, 444).

*An Act to amend an Act entitled "An Act to regulate the Admeasurement of Tonnage of Ships and Vessels of the United States," approved May sixth, eighteen hundred and sixty-four.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act entitled "An act to regulate the admeasurement of tonnage of ships and vessels of the United States," approved May sixth, eighteen hundred and sixty-four, shall be so construed that no part of any ship or vessel shall be admeasured or registered for tonnage that is used for cabins or state-rooms, and constructed entirely above the first deck, which is not a deck to the hull.

## ACT OF 1865, CHAPTER 94 (13 U. S. Stats. at Large, 514).

*An Act to provide for two assistant local Inspectors of Steamboats in the City of New York, and for two local Inspectors at Galena, Illinois, and to re-establish the Board of local Inspectors at Wheeling; and also to amend the Act approved June eighth, eighteen hundred and sixty-four, entitled "An Act to create an additional Inspector of Steamboats and two local Inspectors of Steamboats for Collection Districts of Memphis and Oregon, and for other Purposes."*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That there shall be designated and appointed, in the mode prescribed by law, two assistant local inspectors of steamboats in the city of New York, and two local inspectors at the city of Galena, Illinois, with an annual compensation of twelve hundred dollars for the said assistant local inspectors in the city of New York, and eight hundred dollars for the two local inspectors at the city of Galena, Illinois, as in case of other like inspectors; and said inspectors shall perform the duties and be subject to the provisions of the steamboat act of August thirtieth, eighteen hundred and fifty-two. And the local board of inspectors at Wheeling is hereby re-established.

SEC. 2. *And be it further enacted*, That, in lieu of the fees for inspection prescribed by the sixth section of the act entitled "An act to create an additional supervising inspector of steamboats and two local inspectors of steamboats for the collection district of Memphis, Tennessee, and two local inspectors for the collection district of Oregon, and for other purposes," approved June eighth, eighteen hundred and sixty-four, there shall be levied and paid for each steam vessel of one hundred tons or under, twenty-five dollars, and in addition thereto for each and every ton, in excess of one hundred tons, five cents.

SEC. 3. *And be it further enacted*, That all acts or parts of acts inconsistent with this act are hereby repealed.

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ACT OF 1865, CHAPTER 101 (13 U. S. Stats. at Large, 518).

*An Act to regulate the Fees of Custom-House Officers on the Northern, Northeastern, and Northwestern Frontiers of the United States.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That, in lieu of the fees now authorized by law to be collected by customs officers on the northern, northeastern, and northwestern frontiers of the United States, there shall be levied and collected:—

For admeasurements of vessels, the fees prescribed by the act entitled

"An act to regulate the admeasurement of tonnage of ships and vessels of the United States," approved May six, eighteen hundred and sixty-four.

Certificate of registry, including bond, two dollars and twenty-five cents.

Indorsement on register, one dollar.

Certificate of enrolment, including bond on vessel not exceeding fifty tons, one dollar; on vessel of above fifty and not exceeding one hundred and fifty tons, one dollar and fifty cents; on vessel of over one hundred and fifty tons, two dollars.

License, including bond on vessel of not over one hundred and fifty tons, one dollar; on vessel of over one hundred and fifty tons, one dollar and fifty cents.

Indorsement on license of change of master, including master's oath, fifty cents.

Certifying manifest, and granting clearance for a licensed vessel to go from district to district, on vessel of fifty tons or under, twenty-five cents; on vessel of over fifty tons, fifty cents.

Receiving certified manifest and granting permit to unlade on entry of a vessel from any other district, on vessel of fifty tons or under, twenty-five cents; on vessel of over fifty tons, one dollar.

Entry of a vessel from a foreign port otherwise than by sea, if vessel of fifty tons or under, fifty cents; if of over fifty tons, one dollar; and the same fees for clearance of like vessels to foreign ports.

Receiving manifest of goods brought into the United States from foreign countries adjoining said frontiers by land vehicles, and permit to unlade the same, twenty-five cents.

Receiving manifest of baggage of passengers arriving from foreign countries, adjoining said frontiers, including permit to unlade the same, twenty-five cents.

Granting permit to a vessel not belonging [to] a citizen of the United States to go from district to district, two dollars, and [the] same fee for receiving manifest and granting permit to unlade such vessel on arrival in a district from another district.

Entry of goods imported from any foreign port or place for consumption, warehousing, re-warehousing, transportation or exportation, entry, including official certificate or oath on entry or to invoice, fifty cents, and for every post entry, forty cents.

Permit to land or deliver goods not above provided for, twenty-five cents.

Official bonds not herein provided for, each one dollar.

Debenture on [or] other official certificate not herein provided for, twenty-five cents.

Bill of health, twenty-five cents.

Crew-list, including bond, one dollar.

Protection, fifty cents.

Recording bill of sales, mortgages, hypothecations, or conveyances, fifty cents each, and certified copies thereof, fifty cents each.

Recording certificates for discharging and cancelling such conveyances, fifty cents; copies thereof, twenty-five cents.

Certificate setting forth the names of the owners of a vessel, with their respective interest, and also the material facts of any existing bill of sale, mortgage, hypothecation, or other incumbrance, the date and amount of such incumbrance, and the parties thereto, one dollar: *Provided*, That no bill of sale, mortgage, hypothecation, conveyance, or discharge of mortgage or other incumbrance of any vessel, shall be recorded unless the same is duly acknowledged before a notary public or other officer authorized to take acknowledgments of deeds.

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ACT OF 1865, CHAPTER 117 (13 U. S. Stats. at Large, 535).

*An Act to extend the Provisions of the first Section of "An Act for the Government of Persons in certain Fisheries," approved June nineteenth, eighteen hundred and thirteen.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions of the first section of "An act for the government of persons in certain fisheries," approved on the nineteenth of June, in the year one thousand eight hundred and thirteen, shall extend and apply to the master or skipper and seamen of vessels of the burthen of twenty tons or upwards, qualified according to law for carrying on the mackerel fisheries, bound from a port in the United States to be employed in such fisheries, in the same way as if such fisheries had been embraced in said act: *Provided*, That the agreement named in said section shall be duly made, indorsed, and countersigned.

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ACT OF 1866, CHAPTER 8 (14 U. S. Stats. at Large, 3).

*An Act to regulate the Registering of Vessels.*<sup>1</sup>

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no ship or vessel, which has been recorded or registered as an American vessel, pursuant to law, and which shall have been licensed or otherwise authorized to sail under a foreign flag, and to have the protection of any foreign government during the existence of the rebellion, shall be deemed or registered as an Amer-

<sup>1</sup> See Act of 1866, c. 213.

ican vessel, or shall have the rights and privileges of American vessels, except under the provisions of an act of Congress authorizing such registry.

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ACT OF 1866, CHAPTER 86 (14 U. S. Stats. at Large, 50).

*An Act to prevent and punish Kidnapping.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That if any person shall kidnap or carry away any other person, whether negro, mulatto, or otherwise, with the intent that such other person shall be sold or carried into involuntary servitude, or held as a slave; or if any person shall entice, persuade, or knowingly induce any other person to go on board any vessel or to any other place, with the intent that he or she shall be made or held as a slave, or sent out of the country to be so made or held, or shall in any way knowingly aid in causing any other person to be held, sold, or carried away, to be held or sold as a slave, he or she shall be punished, on conviction thereof, by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment not exceeding five years, or by both of said punishments.

SEC. 2. *And be it further enacted,* That if the master or owners, or person having charge of any vessel, shall receive on board any other person, whether negro, mulatto, or otherwise, with the knowledge or intent that such person shall be carried from any State, territory, or district of the United States, to a foreign country, state, or place, to be held or sold as a slave, or shall carry away from any State, territory, or district of the United States any such person, with the intent that he or she shall be so held or sold as a slave, such master, owner, or other person offending shall be punished by a fine not exceeding five thousand nor less than five hundred dollars, or by imprisonment not exceeding five years, or by both of said punishments. And the vessel on board which said person was received to be carried away shall be forfeited to the United States.

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ACT OF 1866, CHAPTER 162 (14 U. S. Stats. at Large, 81).

*An Act to regulate the Transportation of Nitro-Glycerine, or Glynnin Oil, and other Substances therein named.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That hereafter it shall not be lawful to transport, carry or convey, ship, deliver on board, or cause to be delivered on board, the substance or article known or designated as nitro-glycerine, or glynnin oil, nitro-leum or blasting oil, or nitrated oil, or powder mixed with any such oil, or fibre saturated with any such [article]



or substance upon or in any ship, steamship, steamboat, vessel, car, wagon, or other vehicle, used or employed in transporting passengers by land or water between a place or places in any foreign country and a place or places within the limits of any State, territory, or district of the United States, or between a place in one State, territory, or district of the United States, and a place in any other State, territory, or district thereof; and any person, company, or corporation who shall knowingly violate the provisions of this section shall be liable to a fine of not less than one thousand nor more than ten thousand dollars, at the discretion of the court, one half to the use of the informer.

SEC. 2. *And be it further enacted*, That in case the death of any person shall be caused, directly or indirectly, by an explosion of any quantity of said substances or articles, or either of them, while the same is being placed upon or in any such ship, steamship, steamboat, vessel, car, wagon, or other vehicle, to be transported, carried, or conveyed thereon or therein, in violation of the foregoing section, or while the same is being so transported, carried, or conveyed, or while the same is being removed from such ship, steamship, steamboat, vessel, car, wagon, or other vehicle, every person who knowingly placed or aided, or permitted the placing of the said substance upon or in such ship, steamship, steamboat, vessel, car, wagon, or other vehicle, to be so transported, carried, or conveyed, shall be deemed guilty of manslaughter, and on conviction thereof shall suffer imprisonment for a period not less than two years.

SEC. 3. *And be it further enacted*, That it shall not be lawful to ship, send, or forward any quantity of the said substances or articles, or to transport, convey, or carry the same by a ship, boat, vessel, vehicle, or conveyance, of any description, upon land or water, between a place in a foreign country and a place within the United States, or between a place in one State, territory, or district of the United States, and a place in any other State, territory or district thereof, unless the same shall be securely enclosed, deposited or packed in a metallic vessel surrounded by plaster of Paris, or other material that will be non-explosive when saturated with such oil or substance, and separate from all other substances, and the outside of the package containing the same, be marked, printed, or labelled in a conspicuous manner with the words "Nitro-Glycerine, Dangerous"; and any person, company, or corporation who shall knowingly violate the provisions of this section shall be liable to a fine of not less than one thousand nor more than five thousand dollars, at the discretion of the court, one half to the use of the informer.

SEC. 4. *And be it further enacted*, That the district court of the United States within the district in which any offence against this act shall be committed, or if committed in or upon any ship, boat, vessel, or vehicle, beyond

the territorial limits of any district, then within the district from which the same departed, or that in which it shall first arrive, shall have jurisdiction to try and punish the offender under the provisions of this act.

SEC. 5. *And be it further enacted*, That this act shall not be so construed as to prevent any State, territory, district, city, or town within the United States from regulating or from prohibiting the traffic in or transportation of the said substances between persons and places lying or being within their respective territorial limits, or from prohibiting its introduction into such limits for sale, use, or consumption therein.

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ACT OF 1866, CHAPTER 177 (14 U. S. Stats. at Large, 93).

*An Act relating to Pilots and Pilot Regulations.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That no regulations or provisions shall be adopted by any State of the United States of America which shall make any discrimination in the rate of pilotage or half-pilotage between vessels sailing between the ports of one State and vessels sailing between the ports of different States, or any discrimination against vessels propelled in whole or in part by steam, or against national vessels of the United States, and all existing regulations or provisions making any such discrimination, as herein mentioned, are hereby annulled and abrogated.

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ACT OF 1866, CHAPTER 213 (14 U. S. Stats. at Large, 212)

*An Act to regulate the registering of Vessels.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the act approved on the tenth day of February, in the year one thousand eight hundred and sixty-six, entitled "An act to regulate the registering of vessels," shall not be deemed or construed to affect or limit the operation of the act approved on the twenty-third day of December, in the year one thousand eight hundred and fifty-two, entitled "An act authorizing the secretary of the treasury to issue registers to vessels in certain cases," but the same shall be in full force and effect, anything in the act first aforesaid to the contrary notwithstanding.

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ACT OF 1866, CHAPTER 234 (14 U. S. Stats. at Large, 227).

*An Act further to provide for the Safety of the Lives of Passengers on board of Vessels propelled in whole or in part by Steam, to regulate the Salaries of Steamboat Inspectors, and for other Purposes.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That if any engi-

neer or pilot, licensed in pursuance of law by any inspector or board of inspectors, shall, to the hindrance of commerce, wrongfully or unreasonably refuse to serve as such on any steam vessel, as authorized by the terms of his license, or shall fail to deliver to the applicant for such services, at the time of such refusal, if the same shall be demanded, a statement in writing, signed by such engineer or pilot, of the reasons therefor, or if any pilot shall refuse to admit into the pilot-house with him any person or persons whom the captain or owners of any steamboat may desire to place there for the purpose of acquiring the knowledge of piloting, he shall forfeit and pay to the party aggrieved thereby the sum of three hundred dollars, to be recovered in an action of debt founded on this statute. And thereupon on such recovery, as well as on such refusal to give such statement in writing, or to admit such persons into the pilot-house as aforesaid, his license shall be immediately revoked, upon the same proceedings as are provided by law in other cases of the revocation of such licenses.

SEC. 2. *And be it further enacted*, That when boilers are so arranged on a steamer that there is employed a water connecting-pipe through which the water may pass from one boiler to another, there shall also be provided a similar steam connection, having an area of opening into each boiler of at least one square inch for every two square feet of effective heating surface contained in any one of the boilers so connected, half the flue and all other surfaces being computed as effective. And no boiler shall hereafter be allowed, under any circumstances, a greater working pressure than one hundred and fifty pounds to the square inch.

SEC. 3. *And be it further enacted*, That one or more additional safety-valves, of such dimensions and arrangement as shall be prescribed by the board of supervising inspectors, shall be placed on the boilers of every steamer, and shall be loaded to a pressure not exceeding two pounds above the working steam pressure allowed, and shall be secured by the inspector against the interference of all persons engaged in the management of the vessel or her machinery. And the alloyed metals now required by law, to be placed in or upon the flues of boilers shall be fusible, as now required by law, and at a temperature not exceeding four hundred and forty-five degrees of the Fahrenheit thermometer; and a good and reliable water-gauge and a full set of gauge-cocks shall be provided for each boiler, whether connected or otherwise.

SEC. 4. *And be it further enacted*, That no steamboat boiler hereafter built, to which the heat is applied on the outside of the shell, shall be constructed of plates of more than three tenths of an inch in thickness, the ends or heads of the boiler only excepted. And every steamboat boiler hereafter built, if employed on rivers flowing into the Gulf of Mexico, or their tributaries, shall have not less than three inches of clear space for

water between and around its internal flues. And steamers hereafter built, which shall employ four or more boilers set in a battery, shall have the same divided in such a manner that one half, as nearly as may be, of the number of boilers employed will act independently of the other half, so far as relates to the water connection; but the steam from all the boilers may be connected as provided by this act.

SEC. 5. *And be it further enacted*, That cotton, hemp, hay, straw, or other easily ignitable commodity, shall not be carried on the decks or guards of any steamer carrying passengers, except on ferry-boats crossing rivers, and then only on the sterns of such boats, unless the same shall be protected by a complete and suitable covering of canvas or other proper material, to prevent ignition from sparks, under a penalty of one hundred dollars for each offence. Nor shall coal oil or crude petroleum be hereafter carried on such steamers, except on the decks or guards thereof, or in open holds, where a free circulation of air is secured, and at such distance from the furnaces or fires as may be prescribed by any *superisors* [supervising] inspector or any board of local inspectors.

SEC. 6. *And be it further enacted*, That barges carrying passengers while in tow of a steamer shall be subject to the provisions of the acts for the preservation of the lives of passengers, so far as relates to fire-buckets, axes, and life-preservers. For a violation of this section, the penalty shall be one hundred dollars.

SEC. 7. *And be it further enacted*, That steamers used as freight boats shall be subject to the same inspection and requirements as provided for ferry, tug, and canal boats, by an act relating to steamboats, approved the eighth day of June, eighteen hundred and sixty-four, and to the provisions of this act.

SEC. 8. *And be it further enacted*, That if any person connected, as a member or otherwise, with any association of steamboat pilots, engineers, masters, or owners, shall accept or attempt to exercise the functions of the office of steamboat inspector, it shall be a misdemeanor, for which he shall forfeit his office, and shall be further subject to a penalty of five hundred dollars.

SEC. 9. *And be it further enacted*, That all vessels navigating the bays, inlets, rivers, harbors, and other waters of the United States, except vessels subject to the jurisdiction of a foreign power, and engaged in foreign trade, and not owned in whole or in part by a citizen of the United States, shall be subject to the navigation laws of the United States; and all vessels propelled in whole or in part by steam, and navigating as aforesaid, shall also be subject to all rules and regulations consistent therewith, established for the government of steam vessels in passing, as provided in the twenty-ninth section of an act relating to steam vessels, approved the thir-

tieth day of August, eighteen hundred and fifty-two. And every sea-going steam vessel now subject or hereby made subject to the navigation laws of the United States, and to the rules and regulations aforesaid, shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels; vessels of other countries and public vessels of the United States only excepted.<sup>1</sup>

SEC. 10. *And be it further enacted*, That all sea-going vessels carrying passengers, and those navigating any of the northern and northwestern lakes, shall have the life-boats required by law, provided with suitable boat-disengaging apparatus, so arranged as to allow such boats to be safely launched with their complements of passengers while such vessels are under speed or otherwise, and so as to allow such disengaging apparatus to be operated by one person disengaging both ends of the boat simultaneously from the tackles by which it may be lowered to the water.

SEC. 11. *And be it further enacted*, That the provision for a foremast-head light for steamships, in an act entitled "An act fixing certain rules and regulations for preventing collisions on the water," approved the twenty-ninth day of April, eighteen hundred and sixty-four, shall not be construed to apply to other than ocean-going steamers and steamers carrying sail. River steamers navigating waters flowing into the Gulf of Mexico shall carry the following lights, viz.: one red light on the outboard side of the port smoke-pipe, and one green light on the outboard side of the starboard smoke-pipe; these lights to show both forward and aft, and also abeam on their respective sides. All coasting steamers, and those navigating bays, lakes, or other inland waters, other than ferry-boats, and those above provided for, shall carry the red and green lights, as prescribed for ocean-going steamers; and, in addition thereto, a central range of two white lights; the after light being carried at an elevation of at least fifteen feet above the light at the head of the vessel; the head light to be so constructed as to show a good light through twenty points of the compass, namely, from right ahead to two points abaft the beam on either side of the vessel; and the after light to show all around the horizon.

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ACT OF 1866, CHAPTER 286 (14 U. S. Stats. at Large, 304).

*An Act to prevent the Wearing of Sheath-Knives by American Seamen.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the existing regulation for the government of the navy of the United States, prohibiting the wearing of sheath-knives on shipboard is hereby extended and made applicable to all seamen in the merchant service.

<sup>1</sup> See Act of 1867, c. 83.

SEC. 2. *And be it further enacted*, That it shall be the duty of the master or other officer in command of any ship or vessel registered, enrolled, or licensed under the laws of the United States, and of the owner or other person entering into contract for the employment of a seaman or other subordinate upon any such ship or vessel, to inform every person offering to ship himself of the provisions of this law, and to require his compliance therewith, under a penalty of fifty dollars for each omission, to be sued for and recovered in the name of the United States of America, under the direction of the secretary of the treasury, one half for the benefit of the informer, and the other half for the benefit of the fund for the relief of sick and disabled seamen.

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ACT OF 1866, CHAPTER 298 (14 U. S. Stats. at Large, 328).

*An Act to protect the Revenue, and for other Purposes.*

SECTION 4. *And be it further enacted*, That all laws and parts of laws allowing fishing bounties to vessels hereafter licensed to engage in the fisheries be, and the same are hereby, repealed : *Provided*, That, from and after the date of the passage of [t]his act, vessels licensed to engage in the fisheries may take on board imported salt in bond to be used in curing fish, under such regulations as the secretary of the treasury shall prescribe, and upon proof that said salt has been used in curing fish, the duties on the same shall be remitted.

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ACT OF 1867, CHAPTER 83 (14 U. S. Stats. at Large, 411).

*An Act to amend the Act entitled " An Act further to provide for the Safety of the Lives of Passengers on board of Vessels propelled in whole or in part by Steam, to regulate the Salaries of Steamboat Inspectors, and for other Purposes," approved July 25, 1866.*

SECTION 1. *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That section nine of the act entitled " An act to amend the act entitled ' An act further to provide for the safety of the lives of passengers on board of vessels propelled in whole or in part by steam, to regulate the salaries of steamboat inspectors, and for other purposes,' " approved July twenty-five, eighteen hundred and sixty-six, be, and the same is hereby, amended so as to read as follows : —

SEC. 9. *And be it further enacted*, That all vessels navigating the *bays* [bays], inlets, rivers, harbors, and other waters of the United States, except vessels subject to the jurisdiction of a foreign power, and engaged in foreign trade, and not owned in whole or in part by a citizen of the United States, shall be subject to the navigation laws of the United States ; and all vessels propelled in whole or in part by steam, and navigating as aforesaid, shall also be subject to all rules and regulations consistent therewith,

established for the government of steam vessels in passing, as provided in the twenty-ninth section of an act relating to steam vessels, approved the thirtieth day of August eighteen hundred and fifty-two. And every sea-going steam vessel now subject, or hereby made subject, to the navigation laws of the United States, and to the rules and regulations aforesaid, shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the inspectors of steam vessels; vessels of other countries and public vessels of the United States only excepted; *Provided, however,* That nothing in this act, or in the act of which it is amendatory, shall be construed to annul or affect any regulation established by the existing law of any State requiring vessels entering or leaving a port in such State to take a pilot duly licensed or authorized by the laws of such State, or of a State situate upon the waters of the same port.

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RESOLUTION No. 10 (15 U. S. Stats. at Large, 22).

*A Resolution amending the Ninth Section of "An Act to amend an Act entitled 'An Act to provide for the better Security of the Lives of Passengers on board of Vessels propelled in whole or in part by Steam,' and for other Purposes," approved August thirtieth, eighteen hundred and fifty-two.*

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the fifth division of the ninth section of an act entitled "An act to amend an act entitled an act to provide for the better security of the lives of passengers on board of vessels propelled in whole or part by steam and for other purposes," approved August thirtieth, in the year eighteen hundred and fifty-two, is so far amended that inspectors may, in the license therein provided for, exempt a steamer from the obligation to carry in a safe, chest, or apartment, composed of or lined with metal, compact packages of friction-matches, securely packed in strong, tight wooden chests or boxes, the covers of which shall be firmly fastened on by locks, screws, or other fastenings, and which shall be stowed in a safe part of the steamer designated in their license by the inspectors, and at a safe distance from any fire.

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ACT OF 1868, CHAPTER 137 (15 U. S. Stats. at Large, 84).

*An Act to amend Section Five of an Act entitled "An Act concerning the Registering and Recording of Ships or Vessels," approved December thirty-one, seventeen hundred and ninety-two.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section five of an act entitled "An act concerning the registering and recording of ships or vessels," approved December thirty-one, seventeen hundred and ninety-two, be, and the same is hereby, repealed.

## AN ACT

TO PROVIDE FOR THE LICENSING AND GOVERNMENT OF THE PILOTS AND REGULATING PILOTAGE OF THE PORT OF NEW YORK,

Passed June 23, 1853.

## EMBODYING THE AMENDMENTS,

Passed April 11, 1854, April 4, 1857, March 17, 1865, and May 16, 1867.

ALSO,

THE BY-LAWS OF THE BOARD OF COMMISSIONERS OF PILOTS FOR THE PORT OF NEW YORK.

*The People of the State of New York, represented in Senate and Assembly, do enact as follows :—*

SECTION 1. There shall be in the city of New York a board, entitled "The Board of Commissioners of Pilots," consisting of five persons, to be elected as soon as convenient after the passage of this act, and to hold their offices respectively for two years from the time of their election, and until others shall be elected.

SEC. 2. Three of such commissioners shall be elected by the members of the Chamber of Commerce of the city of New York, at a meeting to be called for the purpose, to be specified in the notice for the meeting and the certificate of the secretary of that body, or other officer regularly performing his duties for the time being, shall be *prima facie* evidence of such election.

SEC. 3. Two other of such commissioners shall be elected by the presidents and vice-presidents of the marine insurance companies of the city of New York, composing or represented in the Board of Underwriters of said city, at a regular convened meeting of such board, on the notice of their secretary, stating that the election of commissioners will take place or of some member of the board by them duly authorized, given in writing at least one day before the election, stating the election of commissioners will take place, and delivered at the office of such company. Each insurance company represented at such meeting shall be entitled to one vote, and the certificate of the secretary of such board, or of any officer acting in his stead, shall be sufficient *prima facie* evidence of an election.

SEC. 4. Upon the expiration of the term of office of any commissioner or commissioners, or within thirty days prior thereto, and upon any vacancy occurring by death, resignation, or removal from the State or other cause, another election for the term of two years shall be made by the same class of persons, or authority, as that which made the election of the office so expiring or becoming vacant.



SEC. 5. Each commissioner before entering upon the duties of his office shall take the usual oath of office before an officer authorized to administer oaths, which oath or affirmation shall be filed without delay in the office of the clerk of the city and county of New York.

SEC. 6. The commissioners shall appoint a secretary, who shall take a like oath, to be filed in like manner, as provided in section five, and they may remove him at any time, and appoint another, and shall prescribe his duties and compensation.

SEC. 7. The board shall establish an office in some convenient and proper place in the city of New York, where the commissioners shall meet on the first Tuesday of every month, and as much oftener, by adjournment, or upon a notice given by any one of them, or by the secretary, as circumstances may require.

SEC. 8. The commissioners shall require their secretary, in person or by deputy, to be in daily attendance at their office on all ordinary business days, during the reasonable office hours, and shall cause to be kept by him a proper book or books in which shall be written all the rules and regulations made by them, and all their official transactions and proceedings, and whatever else may be deemed by them proper and useful, and immediately pertaining to their duties or to the pilot service. They shall also cause to be kept, by their secretary, a register of the names and places of residence of all the pilots who may be licensed by virtue of this act, with the dates of their licenses respectively, and such books may be inspected by any person interested.

SEC. 9. The commissioners, or a majority of them, shall, with all convenient speed, proceed to license, for such term as they may think proper, so many pilots as they may deem necessary for the port of New York ; and such commissioners may specify, in such licenses, different degrees of qualifications, appropriate to different parts or branches of duty, according to the competency of the applicant. No license shall be granted to any person holding any license or authority from, or under the authority or laws of any other State ; and the said commissioners, or a majority of them, shall have power and authority to revoke and annul the license of any person so licensed by them to act as a pilot, who shall not be attached to a boat approved by said board, or who shall be guilty of intoxication or other misconduct while on duty.

SEC. 10. It shall be the duty of the said commissioners, before they shall grant a license to any person applying therefor to act as a pilot in pursuance of this act, within one week thereafter, to call such applicant before them, and in presence of one or more of the pilots of the said port, licensed to pilot vessels to and from the said port, by the way of Sandy Hook, who shall be notified to attend for the purpose, and who are hereby

required to attend and assist in such examination ; or, in case of the non-attendance of the pilot or pilots who shall be so notified to attend for that purpose, then without the presence or assistance of any licensed pilot, to examine or cause to be examined such applicant, touching his qualifications for the office of a pilot, and in particular touching his knowledge of the sailing and management of a square-rigged vessel, and also touching his knowledge of the tides, soundings, bearing, and distance of the several shoals, rocks, bars and points of land, and night lights, in the navigation for which he applies for a license to act as a pilot, and touching any other matter relating thereto, which the said commissioners may think proper. And if, upon examination, the person so applying shall be found to be of good moral character and temperate habits, and to be possessed of sufficient ability, skill, and experience to act as a pilot, and not otherwise, the said commissioners may grant him a license for piloting vessels to and from the port of New York, by way of Sandy Hook.

SEC. 11. The commissioners, before granting licenses, shall require all pilots to enter into recognizance to the people of this State, with two sureties, to be approved by such commissioners, or a majority of them, each in a penalty not exceeding five hundred dollars, conditioned that the pilot shall diligently and faithfully perform his duties as pilot, and observe the rules, and regulations, and decisions of the board ; and every such recognizance shall be prosecuted in the name of the people of the State of New York, by or in behalf of the commissioners, provided a majority of them shall so instruct ; and if any amount be collected in such suit, it shall be paid to the said commissioners, and they may direct the same to be applied for purposes as expressed in section twenty-two.

SEC. 12. The said commissioners shall have the power to regulate the stationing of pilot boats, for the purpose of receiving pilots from outward bound vessels ; and may alter or amend any existing regulations for pilots and make and duly promulgate and enforce new rules or regulations, not inconsistent with the laws of this State, or of the United States, which shall be binding and effectual upon all pilots licensed by them, and upon all parties employing them. They may declare and enforce forfeitures of pilotages, upon any mismanagement or neglect of duty by the pilots licensed by them ; they may declare, and impose, and collect fines and penalties not exceeding two hundred and fifty dollars for each offence ; to prevent any of the pilots licensed by them from combining injuriously with each other, or with other persons, and to prevent any person licensed by them from acting as a pilot during his suspension or after his license may be revoked ; and the said commissioners may establish and enforce all other needful rules and regulations for the conduct and government of the pilots licensed by them, and the parties employing them ; and they may en-

force and receive accounts of all moneys collected for pilotage by the pilots licensed by them, and may impose and collect from such pilots a sum not exceeding three per cent on the amount thereof, to defray their necessary expenses, including clerk hire and office rent.

Any pilot bringing in a vessel from sea shall, by himself or one of his boat's company, be entitled to pilot her to sea when she next leaves the port, unless in the mean time, a complaint for misconduct or incapacity shall have been made against such pilot or one of his boat's company, and proved before the Board of Commissioners of Pilots; provided, however, that if the owner of any vessel shall desire to change such pilot, then the said commissioners may assign any other pilot on the same pilot boat to pilot said vessel to sea.

SEC. 13. The fees for pilotage are hereby established as follows:—

For every merchant vessel, inward bound, and not exempted from pilotage by virtue of these regulations, drawing less than fourteen feet of water, three dollars and seventy-five cents per foot.

For every vessel drawing fourteen feet and less than eighteen feet of water, four dollars and fifty cents per foot.

For every vessel drawing eighteen feet, and under twenty-one feet of water, five dollars and fifty cents per foot.

For every vessel drawing twenty-one feet of water, and upwards, six dollars and fifty cents per foot.

If the masters or owners of any vessel shall request the pilot to moor said vessel at any place within Sandy Hook, and not to be taken to the wharf or harbor of New York, or the vessel to be detained at Quarantine, the same pilotage shall be allowed and the pilot entitled to his discharge.

For piloting national armed vessels of the United States, and also those of foreign nations, seven dollars and fifty cents per foot.<sup>1</sup>

When any ship or vessel, bound to the port of New York, and boarded by any pilot appointed by this board, at such distance to the southward or eastward of Sandy Hook lighthouse as that said lighthouse could not be seen from the deck of such ship or vessel in the daytime, and in fair weather, the addition of one fourth to the rates of pilotage hereinbefore mentioned shall be allowed to such pilot.

SEC. 14. The pilotage on merchant vessels, outward, shall be as follows:—

For every vessel drawing less than fourteen feet of water, two dollars and seventy cents per foot.

For every vessel drawing fourteen feet, and less than eighteen feet of water, three dollars and ten cents per foot.

<sup>1</sup> See ante, p. 707.

For every vessel drawing eighteen feet, and less than twenty-one feet of water, four dollars and ten cents per foot.

For every vessel drawing twenty-one feet and upward, four dollars and seventy-five cents per foot.

SEC. 15. The rates of pilotage for any intermediate distance shall be determined by the board of commissioners, and promulgated in their rules and regulations for the government of pilots.

SEC. 16. Between the first day of November and the first day of April, inclusive, four dollars shall be added to the full pilotage of every vessel coming in or going out of the port of New York.

SEC. 17. For every day of detention in the harbor of an outward bound vessel, after the services of a pilot have been required and given, except detention shall be caused by such adverse winds and weather that the vessel cannot get to sea; and for every day of detention of an inward bound vessel by ice longer than two days for passage from sea to wharf, three dollars shall be added to the pilotage. If any pilot shall be detained at quarantine, or elsewhere, by the health officer, for being or having been on board a sickly vessel, as pilot, the master, owner, agent, or consignee of such vessel shall pay to such pilot all necessary expenses of living, and three dollars per day for each and every day of such detention.

SEC. 18. The pilotage shall be payable by the master, owner, consignee, or agent entering or clearing the vessel at the port of New York, who shall be jointly and severally liable therefor.

SEC. 19. A pilot who is carried to sea when a boat is attending to receive him shall receive at the rate of one hundred dollars a month during his necessary absence.

SEC. 20. Masters of vessels shall give an account to the pilot, when boarding, of the draught of such vessels, and in case the draught given is less than the actual draught, he shall forfeit the sum of twenty-five dollars, which may be sued for and recovered by the commissioners, as is hereinafter provided in section twenty-seven, in respect to other fines and penalties.

SEC. 21. For services rendered by pilots in moving or transporting vessels in the harbor of New York, the following shall be the fees:—

For moving from North to East River, or *vice versa*, (if a seventy-four gun ship, twenty dollars; if a sloop-of-war, ten dollars;) if a merchant vessel, five dollars; except such vessel shall have arrived from sea, or is ready for and bound to sea, on the day such services for transportation are rendered; but if the services are rendered thereafter, such payment shall be made.<sup>1</sup>

For moving any vessel from the quarantine to the city of New York,

<sup>1</sup> See ante, p. 707.

one quarter of the sum that would be due for the inward pilotage of such vessel.

For hauling any vessel from the river to a wharf, or from a wharf into the river, three dollars except on the day of arrival or departure of such vessel.

SEC. 22. It shall be the duty of the commissioners, out of any funds which may be obtained, to provide rewards, to encourage the prompt relief of disabled vessels, and the speedy report of the same, and generally to encourage not only the energetic performance of duty, but benevolent and praiseworthy efforts to relieve vessels and passengers from distress or suffering.

SEC. 23. The commissioners shall have power and authority, at any time, to suspend any pilot so licensed, for any period they may think proper, and also to revoke or annul any license which shall have been granted, upon satisfactory proof of negligence or carelessness on the part of such pilot, or of wilful dereliction of duty, or of wilful disobedience of any lawful rule or regulation duly made and promulgated by said commissioners; but the pilot or pilots so suspended may at any time, upon due notice, appeal to the commissioners for a rehearing of their case; and the commissioners shall have power to confirm or reverse the previous act or decision of the said board.\*

SEC. 24. It shall be the duty of the commissioners to hear and examine all complaints duly made in writing against any pilot licensed by them, or against any person connected with a boat of such pilot, for any misbehavior or neglect of duty, or breach of their rules or regulations, that shall appear to them material to be investigated; and also all complaints made in like manner by any licensed pilot against any master, owner, or seaman of a vessel for any misbehavior toward such pilot in the performance of his duty, or any breach of such rules or regulations.

SEC. 25. Before any person shall be proceeded against on any complaint, and before any pilot be suspended longer than for one month, or be removed, such person or pilot shall be notified in writing, signed by the secretary, to appear before the commissioners, specifying the nature and substance of such complaint, which notice shall be served personally, at least five days before the time fixed for appearance, and the commissioners, for just cause, shall postpone or adjourn the hearing from time to time; a certificate of such commissioners, or a majority of them, with proof of such service or notice, shall be *prima facie*, but not conclusive, evidence that the party upon whom the notice was served, and a fine or penalty thereupon imposed, is liable to pay such fine or penalty.

SEC. 26. The secretary, under the supervision of the commissioners, shall at the instance either of the complaining or defending party, issue

subpœnas for compelling the attendance of witnesses to testify before the commissioners, in all cases in which the power to hear and examine is conferred by the act; and it shall be the duty of the commissioners to examine all such witnesses on oath, to be administered by them, as shall appear to them to give material testimony, and each person subpœnaed as a witness shall be entitled to the like compensation from the party requiring his attendance, and be subject to the like penalties and punishments for disobedience, or for false swearing, as in civil suit at law in the court of record.

SEC. 27. All pecuniary fines or penalties imposed by the said commissioners, by virtue of this act, may be sued for in the name of the "Board of Commissioners of Pilots," and the notice and certificate given as aforesaid may be set forth in pleading, without setting forth other facts or circumstances. The decision of a majority of the commissioners shall be conclusive upon all questions arising under this act, except as hereinbefore provided. In case of an omission to fill any vacancy in the board of commissioners for one month, the remaining two or three commissioners (as the case may be) shall have authority to perform all the duties of the commissioners for the time being.

SEC. 28. It shall be the duty of the secretary and his clerks, if any, when not employed, under the foregoing provisions of this act, to aid the licensed pilots in keeping their accounts of pilotage, and in collecting the same, if desired, and in keeping a register of calls for pilots.

SEC. 29. No master of a vessel under three hundred tons burden, belonging to a citizen of the United States, and licensed and employed in the coasting trade by way of Sandy Hook, shall be required to employ a licensed pilot, but in case the services of a pilot shall have been given, the pilot shall be entitled to the rates established. If the master of any vessel above three hundred tons burden, and owned by a citizen of the United States, and sailing under a coasting license to or from the port of New York by the way of Sandy Hook, shall be desirous of piloting his own vessel, he shall first obtain a license for such purpose from the commissioners of pilots, who are hereby authorized and required to grant the same, if such master shall, after an examination had by said commissioners, be deemed competent; which said license shall be and continue in force one year from the date thereof, or until the termination of any voyage, during which the license may expire. For such license the master, to whom it shall be granted, shall pay to the said commissioners four cents per ton. All masters of foreign vessels and vessels from a foreign port, and all vessels sailing under register, bound to or from the port of New York by the way of Sandy Hook, shall take a licensed pilot; or, in case of refusal to take such pilot, shall himself, owners, or consignees, pay the said pilotage,

as if one had been employed ; and such pilotage shall be paid to the pilot first speaking or offering his services as pilot to such vessel.

Any person not holding a license as pilot under this act, or under the laws of the State of New Jersey, who shall pilot, or offer to pilot any ship or vessel to or from the port of New York by the way of Sandy Hook, except such as are exempt by virtue of this act, or any master or person on board a steam-tug or tow-boat, who shall tow such vessel or vessels without such licensed pilot on board such vessel or vessels, he shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by a fine not exceeding one hundred dollars, or imprisonment not exceeding sixty days ; and all persons employing a person to act as pilot, not holding a license under this act, or under the laws of the State of New Jersey, shall forfeit and pay to the Board of Commissioners of Pilots the sum of one hundred dollars.

The provisions of this act shall not apply to vessels propelled wholly or in part by steam, owned or belonging to citizens of the United States, and licensed and engaged in the coasting trade.

SEC. 30. This act shall not repeal, or in any way affect the provisions of an act, entitled " An act concerning the pilots of the channel of the East River, commonly called ' Hell Gate,' " passed April 15, 1847.

SEC. 31. All laws now in force, and which are inconsistent with the provisions of this act, are hereby repealed.

APRIL 24, 1857.

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## BY - L A W S .

1st. The election for President shall take place on the second Tuesday in October, and be for the term of two years, and in case of death or resignation the vacancy shall be filled at a regular meeting of the board.

The Secretary and Assistant Secretary shall be chosen when there is a vacancy ; their term of service to be during the pleasure of the Board.

2d. The President shall preside at the meetings of the Board, and his duties shall be to conduct the examination of candidates for the office of pilot, sign licenses when granted, and exercise a general supervision over the office. In the absence of the President, a Chairman *pro tem.* shall be appointed, whose duties shall be the same.

3d. The duties of the Secretary shall be as provided in sections 8 and 28.

4th. The meetings shall be as provided for in section 7.

5th. The charge for licenses shall be one dollar for the first issue, and twenty-five cents for renewal.

6th. The pilots shall pay  $2\frac{1}{2}$  per cent on the gross amount of pilotage, which sum shall be paid to the Secretary of the Board within one month from the time said pilotage was earned, and any pilot not so paying shall forfeit his license.

7th. The pilots shall report to the Secretary at the office of the Board the name and draught of every vessel piloted by them ; where boarded, and what extra services, if any, were rendered ; and such report shall be made within 48 hours after the services have been performed, under a penalty of ten dollars for each vessel not so reported.

Should a vessel take the ground or meet with any accident while in charge of a pilot, the pilot shall report the same to the Secretary at the office of the Board within 24 hours after arrival in port. Every violation of this rule shall be punishable by a fine of twenty-five dollars.

8th. The boats shall keep station at or near the Hook, alternately, for four days each, and in accordance with a list to be made out by the Secretary. When on station, the boat shall have a conspicuous signal at the masthead. It shall be the duty of the boat on station to render every necessary aid for taking out and receiving pilots from outward bound vessels, and give every facility for sending said pilots to the city of New York or quarantine.

In case a pilot is carried off to sea in consequence of the non-attendance of the station boat, except by unavoidable accident, the company of said boat shall pay to him at the rate of \$100 per month during his necessary absence.

The boat on station shall remain until relieved ; and any boat not being in time to take her station, shall pay to the boat not relieved, \$25 per day, and shall likewise have added to her station the time she is absent.

**SIGNAL.** — Jack at the foremast head.

9th. All boats shall have conspicuous numbers in their sails, said numbers to be designated by the commissioners.

10th. No pilot shall, by any unfair means, or by a reduced rate, take a vessel from another pilot, and in case of his so doing, shall forfeit to the pilot displaced the full amount of the pilotage.

11th. No boat shall put a boy or other person than a licensed pilot on board a vessel, for the purpose of piloting said vessel, under a penalty of fifty dollars and the amount of pilotage, said sum to be paid by the owners of the boat to the commissioners, and to be applied as directed in section 22. This shall not apply to vessels in distress, providing the masters of such vessels are willing to employ the services of such boy or person ; such boy or person shall keep the Jack flying until the lighthouse on Sandy Hook bears south ; and in case a regular pilot takes charge of the vessel, the person who first took charge shall be entitled to half the inward pilotage.



12th. All matters in relation to apprentices shall be left to the commissioners, both as to their number, time of service, &c., &c.

13th. There shall be a register kept in the office of all boat-keepers. Boat-keepers serving the longest time in one boat shall, when an appointment is to be made, have the preference, said time not to be less than three years. Any boat-keeper leaving one boat and going to another, without good and sufficient cause, shall lose all the privileges he may have of becoming a pilot.

14th. The names of all persons applying for license to pilot shall be posted up in some conspicuous place in the office of the commissioners, at least thirty days before any examination shall be had, and any person having any complaint to make against an applicant, shall make the same in writing, giving his reasons therefor, the same to be open to inspection.

15th. Pilots are required to board the nearest vessel having a signal flying for a pilot, except in case there should be a vessel in sight with a signal of distress, under a penalty of fifty dollars.

16th. Every licensed pilot shall be attached to a pilot boat; no pilot shall remain unattached for more than thirty days, without permission from the commissioners. Any pilot neglecting or refusing to join a pilot boat, within ten days after due notice shall have been given him to join a boat, shall, unless satisfactory reasons are given for the non-compliance of the order, be fined the sum of \$10, or be suspended for such time as the commissioners shall deem proper, or have his license revoked, at the option of the commissioners.

17th. Pilots are required to transport a vessel to any part of the port of New York, when applied to, under a penalty of twenty-five dollars, such service to be paid for as per section 21 of the law.

18th. No master of a pilot boat shall carry to sea on her station, or be in any way aiding or assisting in putting on board any ship or vessel, for the purpose of piloting or conducting her, any person not licensed, or whose license as a pilot shall have been suspended or withdrawn by the commissioners, or shall not have been renewed. If any such person shall be received on board a pilot boat, the pilot or pilots receiving him on board, shall, for every offence, forfeit and pay the sum of \$25 each; for a second or subsequent offence, the pilot or pilots shall be liable to suspension, or forfeiture of his or their license or licenses, at the discretion of the commissioners.

19th. Any pilot destroying or mutilating by erasure or otherwise, any memorial, petition, or other papers posted up in the office, by order of the commissioners, will be subject to a fine of \$25, or suspension, as the commissioners may decide.

20th. A pilot, while on his business as a pilot, found guilty of using

abusive or insulting language, or guilty of threatening conduct, shall be suspended, or have his license revoked, as the commissioners may adjudge.

21st. Pilotage for taking vessels from the old to the new Quarantine:

For vessels having had death or sickness on board, double outward pilotage.

For vessels from sickly ports, but having had no sickness on board, single outward pilotage.

Pilotage of vessels from Lower Quarantine to New York, half pilotage.

Pilotage of vessels from lower to upper Quarantine quarter pilotage.

22d. Vessels boarded north or west of a line drawn from the lights on the Highlands of Neversink to the Black Buoy No. 1, of the Bar, thence to the Red Buoy No. 2 of Gedney's Channel, shall pay half pilotage only. If boarded above the Narrows, quarter pilotage. This by-law has no reference to section 21.

23d. Renewals of masters' licenses shall date from the first license granted. A vessel having made a voyage without renewing her license and paying pilotage, shall not derive any benefit from having paid such pilotage.

24th. No pilotage, except the regular inward pilotage, shall be allowed, when vessels are detained from the *non-visiting* of the health officer.

25th. Vessels returning from sea in consequence of head winds or stress of weather, shall pay full pilotage.

26th. In case of a pilot falling in with a vessel in distress or ashore, it shall be his duty to notify the underwriters as soon as possible. Any pilot omitting to do so shall be liable to a fine of \$25; and whenever any pilot shall observe that any of the buoys are not in their proper places, or that any of the lighthouses are not lighted and extinguished at the proper times, he shall, as soon as he returns to town, report the same to the Secretary, at the office of the Board.

27th. Every pilot boat shall have a log-book, in which shall be recorded the name, nativity, and age of every person attached to said boat, the regular occurrences of the day, weather, courses and distances, vessels spoken, &c.; said log-book shall at all times be open to the inspection of the commissioners of pilots, or such person as they may designate, and when such log-book is completed, which shall be on the first day of the months of January, April, July, and October in each year, it shall be deposited in the office of the Board of Commissioners of Pilots. Should a boat be at sea on the dates designated herein, then the said log-book shall be so deposited within 48 hours after the return of said boat to this port.

28th. Any pilot bringing in a vessel from sea shall by himself, or one of his boat's company, be entitled to pilot her to sea when she next leaves the port, unless in the mean time a complaint for misconduct or incapacity shall have been made against such pilot, or one of his boat's company, and proved before the Board of Commissioners of Pilots. Any pilot who shall

take such vessel to sea without the consent of the pilot who brought her in-to port (such last-mentioned pilot, or one of his boat's company, being ready, and offering to take her to sea) shall pay a sum equal to the legal outward pilotage, which shall be recoverable in the name of the Board of Commissioners of Pilots, for the benefit of the pilot entitled to perform the service.

29th. Any pilot boat taking or receiving from an outward bound vessel a pilot under suspension, or whose license has been revoked, or a person not holding a license under the laws of this State or of the State of New Jersey, will be subject to a fine of twenty-five dollars for each pilot or person so taken or received on board to be paid by the owners of such pilot boat.

For a second offence the fine shall be a sum equal to the amount of the pilotage of the vessel from which such pilot or person shall be taken or received.

30th. The boat-keeper of every station-boat shall report to the Secretary of the Board, in writing, the name of every pilot taken or received by the boat from an outward bound vessel, and also the name of such vessel in connection with the name of the pilot, immediately on her return to port, or in neglecting to do so, shall be subject to a fine of fifty dollars for each pilot so received and not reported. Said fine to be paid by the owners of such boat.

31st. All pilots holding licenses under this Board, or who may be hereafter licensed, shall, whenever required, take and subscribe before the President of the Board an oath of allegiance to the government of the United States, in the form now administered to persons holding office under the general government; and in case of refusal or omission by any pilot to take and subscribe such oath, he shall be punished by suspension for such period as the Board may determine, or by a revocation of his license.

32d. No boat shall withdraw from service [except for ordinary repairs] without a written application to the Board, explaining the object of the withdrawal; the same to be subject to the decision of the Board.

33d. Every person applying for examination and license as a pilot shall make such application in his own handwriting; and such applicant should have a knowledge of Navigation, sufficient to enable him to find the latitude by an observation of the sun's altitude, to keep a dead reckoning, and to lay down courses upon a chart.

34th. A pilot boat when in sight of a vessel wanting a pilot shall, if there are no pilots on board, signalize the fact by running her flag or signal up and down twice in the daytime; and at night by making a like signal with her masthead light.

35th. No pilot, without special permission from this Board, shall go by vessel, or otherwise, to any neighboring or foreign port for the purpose of

boarding or piloting any vessel bound to the port of New York, nor shall any pilot offer in any neighboring or foreign port, or the waters adjacent thereto, to pilot any vessel to the port of New York, under penalty of forfeiture of the pilotage to the pilot boat which shall first speak the vessel so piloted.

36th. A pilot in charge of a vessel is required to stay on board until notified by the master that his services are no longer wanted, under the penalty of forfeiting the pilotage. The omission of the master to inform the pilot that his services are not wanted will entitle the pilot to detention money unless the detention is temporary, to take out *passengers*.

*Rates of Pilotage from April 1st to November 1st.*

| INWARD.     |         |          |            |          | OUTWARD. |          |
|-------------|---------|----------|------------|----------|----------|----------|
| Draught.    | Rate.   |          | Off Shore. | Total.   | Rate.    |          |
| 6 ft. 0 in. | \$ 3 75 | \$ 22 50 | \$ 5 62    | \$ 28 12 | \$ 2 70  | \$ 16 20 |
| 6 6         | 3 75    | 24 37    | 6 09       | 30 46    | 2 70     | 17 55    |
| 7 0         | 3 75    | 26 25    | 6 56       | 32 81    | 2 70     | 18 90    |
| 7 6         | 3 75    | 28 12    | 7 03       | 35 15    | 2 70     | 20 25    |
| 8 0         | 3 75    | 30 00    | 7 50       | 37 50    | 2 70     | 21 60    |
| 8 6         | 3 75    | 31 87    | 7 96       | 39 83    | 2 70     | 22 95    |
| 9 0         | 3 75    | 33 75    | 8 44       | 42 19    | 2 70     | 24 30    |
| 9 6         | 3 75    | 35 62    | 8 90       | 44 52    | 2 70     | 25 65    |
| 10 0        | 3 75    | 37 50    | 9 37       | 46 87    | 2 70     | 27 00    |
| 10 6        | 3 75    | 39 37    | 9 84       | 49 21    | 2 70     | 28 35    |
| 11 0        | 3 75    | 41 25    | 10 31      | 51 56    | 2 70     | 29 70    |
| 11 6        | 3 75    | 43 12    | 10 78      | 53 90    | 2 70     | 31 05    |
| 12 0        | 3 75    | 45 00    | 11 25      | 56 25    | 2 70     | 32 40    |
| 12 6        | 3 75    | 46 87    | 11 72      | 58 59    | 2 70     | 33 75    |
| 13 0        | 3 75    | 48 75    | 12 19      | 60 94    | 2 70     | 35 10    |
| 13 6        | 3 75    | 50 62    | 12 65      | 63 27    | 2 70     | 36 45    |
| 14 0        | 4 50    | 63 00    | 15 75      | 78 75    | 3 10     | 43 40    |
| 14 6        | 4 50    | 65 25    | 16 31      | 81 56    | 3 10     | 44 95    |
| 15 0        | 4 50    | 67 50    | 16 87      | 84 37    | 3 10     | 46 50    |
| 15 6        | 4 50    | 69 75    | 17 43      | 87 18    | 3 10     | 48 05    |
| 16 0        | 4 50    | 72 00    | 18 00      | 90 00    | 3 10     | 49 60    |
| 16 6        | 4 50    | 74 25    | 18 56      | 92 81    | 3 10     | 51 15    |
| 17 0        | 4 50    | 76 50    | 19 12      | 95 62    | 3 10     | 52 70    |
| 17 6        | 4 50    | 78 75    | 19 69      | 98 44    | 3 10     | 54 25    |
| 18 0        | 5 50    | 99 00    | 24 75      | 123 75   | 4 10     | 73 80    |
| 18 6        | 5 50    | 101 75   | 25 44      | 127 19   | 4 10     | 75 85    |
| 19 0        | 5 50    | 104 50   | 26 12      | 130 62   | 4 10     | 77 90    |
| 19 6        | 5 50    | 107 25   | 26 81      | 134 06   | 4 10     | 79 95    |
| 20 0        | 5 50    | 110 00   | 27 50      | 137 50   | 4 10     | 82 00    |
| 20 6        | 5 50    | 112 75   | 28 19      | 140 94   | 4 10     | 84 05    |
| 21 0        | 6 50    | 136 50   | 34 12      | 170 62   | 4 75     | 99 75    |
| 21 6        | 6 50    | 139 75   | 34 94      | 174 69   | 4 75     | 102 12   |
| 22 0        | 6 50    | 143 00   | 35 75      | 178 75   | 4 75     | 104 50   |
| 22 6        | 6 50    | 146 25   | 36 56      | 182 81   | 4 75     | 106 87   |
| 23 0        | 6 50    | 149 50   | 37 37      | 186 87   | 4 75     | 109 25   |
| 23 6        | 6 50    | 152 75   | 38 19      | 190 94   | 4 75     | 111 62   |
| 24 0        | 6 50    | 156 00   | 39 00      | 195 00   | 4 75     | 114 00   |
| 24 6        | 6 50    | 159 25   | 39 81      | 199 06   | 4 75     | 116 37   |
| 25 0        | 6 50    | 162 50   | 40 62      | 203 12   | 4 75     | 118 75   |

*Rates of Pilotage from November 1st to April 1st.*

(FOUR DOLLARS ADDITIONAL.)

| INWARD.     |         |          |            |          | OUTWARD. |          |
|-------------|---------|----------|------------|----------|----------|----------|
| Draught.    | Rate.   |          | Off Shore. | Total.   | Rate.    |          |
| 6 ft. 0 in. | \$ 3 75 | \$ 26 50 | \$ 5 62    | \$ 32 12 | \$ 2 70  | \$ 20 20 |
| 6 6         | 3 75    | 28 87    | 6 09       | 34 46    | 2 70     | 21 55    |
| 7 0         | 3 75    | 30 25    | 6 56       | 36 81    | 2 70     | 22 90    |
| 7 6         | 3 75    | 32 12    | 7 03       | 39 15    | 2 70     | 24 25    |
| 8 0         | 3 75    | 34 00    | 7 50       | 41 50    | 2 70     | 25 60    |
| 8 6         | 3 75    | 35 87    | 7 96       | 43 83    | 2 70     | 26 95    |
| 9 0         | 3 75    | 37 75    | 8 44       | 46 19    | 2 70     | 28 30    |
| 9 6         | 3 75    | 39 62    | 8 90       | 48 52    | 2 70     | 29 65    |
| 10 0        | 3 75    | 41 50    | 9 37       | 50 87    | 2 70     | 31 00    |
| 10 6        | 3 75    | 43 37    | 9 84       | 53 21    | 2 70     | 32 35    |
| 11 0        | 3 75    | 45 25    | 10 31      | 55 56    | 2 70     | 33 70    |
| 11 6        | 3 75    | 47 12    | 10 78      | 57 90    | 2 70     | 35 05    |
| 12 0        | 3 75    | 49 00    | 11 25      | 60 25    | 2 70     | 36 40    |
| 12 6        | 3 75    | 50 87    | 11 72      | 62 59    | 2 70     | 37 75    |
| 13 0        | 3 75    | 52 75    | 12 19      | 64 94    | 2 70     | 39 10    |
| 13 6        | 3 75    | 54 62    | 12 65      | 67 27    | 2 70     | 40 45    |
| 14 0        | 4 50    | 67 00    | 15 75      | 82 75    | 3 10     | 47 40    |
| 14 6        | 4 50    | 69 25    | 16 31      | 85 56    | 3 10     | 48 95    |
| 15 0        | 4 50    | 71 50    | 16 87      | 88 37    | 3 10     | 50 50    |
| 15 6        | 4 50    | 73 75    | 17 43      | 91 18    | 3 10     | 52 05    |
| 16 0        | 4 50    | 76 00    | 18 00      | 94 00    | 3 10     | 53 60    |
| 16 6        | 4 50    | 78 25    | 18 56      | 96 81    | 3 10     | 55 15    |
| 17 0        | 4 50    | 80 50    | 19 12      | 99 62    | 3 10     | 56 70    |
| 17 6        | 4 50    | 82 75    | 19 69      | 102 44   | 3 10     | 58 25    |
| 18 0        | 5 50    | 103 00   | 24 75      | 127 75   | 4 10     | 77 80    |
| 18 6        | 5 50    | 105 75   | 25 44      | 131 19   | 4 10     | 79 35    |
| 19 0        | 5 50    | 108 50   | 26 12      | 134 62   | 4 10     | 81 90    |
| 19 6        | 5 50    | 111 25   | 26 81      | 138 06   | 4 10     | 83 95    |
| 20 0        | 5 50    | 114 00   | 27 50      | 141 50   | 4 10     | 86 00    |
| 20 6        | 5 50    | 116 75   | 28 19      | 144 94   | 4 10     | 88 05    |
| 21 0        | 6 50    | 140 50   | 34 12      | 174 62   | 4 75     | 103 75   |
| 21 6        | 6 50    | 143 75   | 34 94      | 178 69   | 4 75     | 106 12   |
| 22 0        | 6 50    | 147 00   | 35 75      | 182 75   | 4 75     | 108 50   |
| 22 6        | 6 50    | 150 25   | 36 56      | 186 81   | 4 75     | 110 87   |
| 23 0        | 6 50    | 153 50   | 37 37      | 190 87   | 4 75     | 113 25   |
| 23 6        | 6 50    | 156 75   | 38 19      | 194 94   | 4 75     | 115 62   |
| 24 0        | 6 50    | 160 00   | 39 00      | 199 00   | 4 75     | 118 00   |
| 24 6        | 6 50    | 163 25   | 39 81      | 203 06   | 4 75     | 120 37   |
| 25 0        | 6 50    | 166 50   | 40 62      | 207 12   | 4 75     | 122 75   |

*Transportation North to East River, and vice versa.*

All vessels . . . . \$ 5.00.

Pilotage from Quarantine, one quarter of the Inward Pilotage, exclusive of Off Shore.

Hauling to or from wharf, three dollars.

Detention three dollars per day.

## PILOTAGE ACT OF MASSACHUSETTS.

AN ACT CONCERNING PILOTAGE.<sup>1</sup>

*Be it enacted, &c., as follows:—*

SECTION 1. All persons holding commissions as pilots in this Commonwealth shall continue to hold the same until the same are revoked, or the authority to act under the same is suspended, as provided herein.

SEC. 2. The regulations concerning pilotage now in force, being the provisions contained in the schedule hereto annexed except so far as the same are hereby modified or changed, shall remain in force until the same are altered, amended, or annulled pursuant to the provisions of this act.

SEC. 3. The governor with the advice and consent of the council is authorized to appoint and commission two persons to execute the office of commissioners of pilots for the harbor of Boston who shall hold their office during the term of three years unless sooner removed by the governor and council: *Provided, always*, that the said persons shall first be recommended by the trustees of the Boston Marine Society, and that no such commissioner shall at the same time be one of said trustees; but they shall be persons of experience in maritime and nautical affairs. *And* if the said trustees shall refuse, decline, or be unable to make the recommendation above provided for, the governor and council shall appoint the said commissioners without such recommendation.

SEC. 4. The said commissioners shall grant commissions for pilots in the harbor of Boston to such persons as they shall deem competent to receive them, and who have been approved by the trustees of the Boston Marine Society. They may, upon satisfactory evidence of misconduct, carelessness, or neglect of duty, suspend, until the meeting of the trustees then next ensuing, any pilot who now holds or may hereafter hold a commission as pilot for the harbor of Boston; and if the said trustees at their said next meeting shall decide that such commission ought to be revoked, the said commissioners may revoke the same, or may at their discretion continue the suspension of such pilot until the next stated meeting of said trustees and no longer for the same offence. They shall see that the laws and regulations for pilotage within the harbor of Boston are duly observed and executed. They shall receive and hear complaints by and against pilots for the harbor of Boston and examine into and decide the same;— and generally they shall exercise within the harbor of Boston the same jurisdiction and have the same powers as are now exercised by the commissioners of pilots, except so far as the same are limited by the provisions of this act.

<sup>1</sup> Act of 1862, c. 176.

SEC. 5. There shall be appointed by the said commissioners a secretary, whose duty it shall be to keep an office and be in attendance during the day to receive all complaints of and against pilots for the harbor of Boston, and all notifications to the same; and said secretary shall keep a fair record of the doings of said office, to be open at all times for examination and inspection.

SEC. 6. Once in every three months each pilot for the port of Boston shall render to the said commissioners an accurate account of all vessels piloted by him, and of all moneys received by him, or by any person for him, for pilotage, and he shall pay said commissioners three<sup>1</sup> per cent on the amount thereof; and the said pilots shall add three<sup>1</sup> per cent to the rates established by law at the time of rendering pilot service, and may collect the same as they are authorized to collect pilotage fees; and if any pilot shall make a false return of moneys received, he shall pay a sum not exceeding fifty dollars; and from the sums so collected and paid into said office, each commissioner shall receive such compensation as the trustees of the Boston Marine Society may fix, together with such allowances for office rent, clerk hire, and other incidental expenses as the said trustees may think suitable. And if there shall remain any surplus arising from said commissions, after the said payments are made, the same shall be paid into the treasury of the Boston Marine Society.

SEC. 7. The harbor of Boston, for the purposes of this act, shall be held to include all places or landings accessible to vessels from sea included within the limits of Nahant Rock on the north and Point Alderton on the south.

SEC. 8. The governor, with the advice and consent of the council, may appoint one or more suitable persons as pilots for the ports of Salem, Marblehead, and Beverly, respectively: *Provided*, that said persons shall first have the recommendation of the master of the Marine Society, in Salem, and of the president of the Salem East India Marine Society.

SEC. 9. Any pilot who now holds, or hereafter may hold, a commission as pilot for the ports named in the preceding section, or either of them, may be removed from office by the governor, with the advice and consent of the council, whenever the master and president of the societies aforesaid shall certify that such pilot is incapable of discharging the duties of said office, or otherwise unsuitable to be continued therein, or that the public interest requires that he should no longer remain in office.

SEC. 10. The governor, with the advice and consent of the council, may appoint one or more suitable persons to be a branch pilot or pilots for the port of Newburyport: *Provided*, that every such person shall first obtain from the Marine Society of Newburyport a certificate, signed by its clerk,

<sup>1</sup> Changed to four by Act of 1863, c. 75.

stating that in the opinion of said society such person is capable and suitable to be appointed to that office; and every such person who now holds, or may hereafter hold, a commission as pilot for said port may be removed by the governor and council whenever the said society shall in like manner certify that he is incapable of discharging the duties of said office, or is otherwise unsuitable to be continued therein, or that the public interest requires that he should no longer remain in office.

SEC. 11. There shall be appointed by the governor, with the advice and consent of the council, three persons to be denominated port wardens of the ports of Gloucester and Rockport, who shall hold their offices during the pleasure of the governor and council. They shall recommend to the governor suitable persons to be pilots for the ports of Gloucester, Rockport, and Manchester, respectively, who shall receive commissions as such, if approved by the governor with the consent of the council.

SEC. 12. There shall be appointed by the governor, with the advice and consent of the council, five persons, two of whom shall reside in New Bedford or Fairhaven, two in Dukes County and one in Wareham, to be denominated port wardens of the ports upon Buzzard's Bay and the island of Martha's Vineyard, who shall hold their office during the pleasure of the governor and council. They shall recommend to the governor suitable persons to be pilots for the said ports, respectively, who shall receive commissions as such, if approved by the governor with the consent of the council.

SEC. 13. There shall be appointed by the governor, with the advice and consent of the council, three persons, one of whom shall reside in Fall River, one in Somerset, and one in Taunton, to be denominated port wardens for Taunton River, who shall hold their offices during the pleasure of the governor and council. They shall recommend to the governor suitable persons to be pilots for Taunton River, and the ports connected with the same, who shall receive commissions as such, if approved by the governor with the consent of the council.

SEC. 14. There shall be appointed by the governor, with the advice and consent of the council, two persons to be port wardens for the port of Provincetown. The commissioners of pilots for the harbor of Boston, and the port wardens of the port of Provincetown, shall recommend, from time to time, suitable persons, not exceeding six in number, to be bay and harbor pilots, as mentioned in the schedule hereto annexed for the harbor of Provincetown and other harbors.

SEC. 15. In all ports and places not mentioned in this act, for which pilots have been heretofore or are now commissioned, the governor, with the consent of the council, shall have power to appoint suitable persons to be pilots, who shall hold their commissions during the pleasure of the gover-



nor and council. All pilots in such ports and places may be suspended or removed at any time by the governor and council.

SEC. 16. In all cases in which any persons or society are authorized, by the provisions of this act, to recommend suitable persons for appointment as pilots, it shall be lawful for the same persons or society to suspend any pilot, whether now commissioned or hereafter to be commissioned, for his misconduct, carelessness, or neglect of duty; and in such case, such suspension shall not continue beyond the term of sixty days, unless the same shall be approved by the governor with the consent of the council. Whenever the said persons or society respectively shall certify to the governor that any pilot who now holds or hereafter may hold a commission as pilot within their respective jurisdictions, is incapable of discharging the duties of his office, or is otherwise unsuitable to be continued therein, or that the public interest requires that he should no longer remain in office, such pilot may be removed from office, and his commission revoked by the governor with the consent of the council.

SEC. 17. The commissioners of pilots for the harbor of Boston, and the persons hereby authorized to recommend suitable persons for appointment as pilots, respectively, may, from time to time, recommend to the governor and council such changes or modifications of the pilotage regulations, for the ports or places within their respective jurisdictions as to them shall seem fit; and if such modifications or changes, respectively, or any portion of the same, shall be approved by the governor with the consent of the council, the governor shall make proclamation thereof, and shall cause such modifications or changes to be published for four weeks consecutively, in the paper selected by the secretary of the Commonwealth, pursuant to the provisions of chapter three, section four, of the General Statutes, and the same being so proclaimed and published for four weeks consecutively, shall have the force of law and be obeyed by all persons. All such modifications and changes shall be reported by the secretary of the Commonwealth to the legislature, and the same shall also be published annually with the laws of the Commonwealth.

SEC. 18. Each pilot receiving a commission shall pay therefor the sum of five dollars.

SEC. 19. No person shall receive a commission, or exercise the office of pilot, until he has given to the treasurer of the Commonwealth, a bond with two sureties in the penal sum of one thousand dollars for the faithful performance of all the duties of his office. The sureties on the bonds of pilots for the harbor of Boston shall be satisfactory to the commissioners of pilots of the harbor of Boston; the sureties upon the bonds of pilots for the other ports and places mentioned in this act shall be approved by the persons or societies recommending such persons as pilots; and the

sureties upon the bonds of all other pilots shall be approved by the governor and council.

SEC. 20. Whenever any surety upon the bond of any pilot shall desire to be discharged from his liability thereon, as provided in the ninth section of chapter fifty-three of the General Statutes, notice of the same shall be given to the commissioners or to the persons or society hereby authorized to approve the sureties upon said bond, as the case may be, or if such bond was approved by the governor and council, notice shall be given to the governor and council; and notice shall also be given in writing by such surety to such pilot, and the same may be served by any constable of any town in which said pilot may be; and such notice, with the return of such constable thereon, shall be filed with the treasurer of the Commonwealth, and at the end of thirty days from the date of the filing of said notice with the treasurer, the liability of such surety for any acts of said pilot, after the expiration of said thirty days, shall cease. If any pilot, being so notified, shall fail to furnish a new bond before the expiration of said thirty days, his commission shall become void.

SEC. 21. In case of the decease or insolvency of any surety upon the bond of any pilot, said pilot shall give notice of the same to the commissioners of pilots for the harbor of Boston, if such pilot is a pilot for the harbor of Boston, or to the persons or society who recommended his appointment, or to the governor and council, if such pilot was appointed for any port or place not specially mentioned in this act, and thereupon a new bond shall be required to be given.

SEC. 22. Section twelve of chapter fifty-two of the General Statutes is hereby repealed.

SEC. 23. The board of pilot commissioners is hereby abolished, but returns shall be made to such commissioners, by all pilots, of the pilotage fees by them earned or received as provided by section twelve of chapter fifty-two of the General Statutes, up to the day when this act shall take effect, and they shall pay to the said commissioners the amount in said sections provided; and if any pilot shall fail to make such return and payment, complaint thereof may be made to the governor and council, and if such complaint is found to be true, the commission of such pilot shall be revoked or suspended at the pleasure of the governor.

SEC. 24. This act shall take effect, so far as concerns the appointment of commissioners and port wardens, upon its passage; as to all other matters, it shall take effect upon the first day of June next.

#### SCHEDULE.

#### *General Regulations for Pilotage in the Commonwealth of Massachusetts.*

1. No person not holding a commission as pilot (excepting those actually

employed on board of the vessel for the voyage) shall in any case exercise the duties of a pilot on board of any vessel within the waters of this Commonwealth, whether said vessel is liable to compulsory pilotage or not, provided a commissioned pilot offers his services, or can be obtained at a reasonable time, under a penalty of not less than twenty, and not exceeding fifty dollars for each and every offence.

2. If at any time the bond of any pilot shall appear to be insufficient, a new one shall be required.

3. No vessel shall be liable to pilotage in or out of any port other than her ports of departure and destination. But if the aid of a pilot be required, the pilot shall be bound to do the duty and entitled to the regular compensation therefor.

4. Every vessel inward bound, excepting the vessels provided for in sections 17 and 18, of these general regulations, shall receive the first pilot holding a commission for her port of destination that may offer his services, and shall be holden to pay such pilot the regular fees for pilotage, whether his services be accepted or not. Outward bound vessels, in all cases, are requested to give a preference to the pilot who may have brought said vessel into port, or to a pilot from the same boat.

5. It shall be the duty of every pilot to first board vessels (irrespective of size) having signals set for a pilot. When there are no signals to be seen, then the pilots are to offer their services to the first vessel which they can board; and in case any vessel liable to pilotage should refuse to take a pilot, it shall be the duty of the pilot to inform said vessel that she will be holden to pay the regular fees for pilotage, whether his services are accepted or not.

6. Every pilot shall exhibit his commission, when required, to the master of any vessel of which he may take charge.

7. No pilot shall take charge of any vessel drawing more water than his commission authorizes, under penalty of suspension or dismission.

8. Every pilot shall be liable, together with his bondsmen, for all damages that may accrue from his negligence, unskilfulness, or unfaithfulness.

9. The period during which winter rates of pilotage shall be allowed shall be uniformly from November 1 to April 30, inclusive; summer rates from May 1 to October 31, inclusive, for all the ports of the Commonwealth.

10. The hull and appurtenances of every vessel shall be liable for all legal claims on account of pilotage, either rendered or offered, for the space of sixty days.

11. All pilots shall anchor vessels carrying alien passengers, or vessels subject to quarantine, at the places assigned for such purpose by the proper

authorities, under penalty of suspension or dismissal, as well as of the fines by law provided for neglect thereof.

12. All disputes between pilots in relation to their rights, privileges, and duties with each other shall be referred to and settled by three master pilots, to be chosen by the parties for that purpose, to be adjusted and settled according to the regulations and the laws.

13. Whenever any vessel shall be anchored under the regulations for quarantine, or alien passengers, for twelve hours or over, the pilot in charge shall be entitled to twenty-five per cent in addition to the ordinary fees, by afterwards piloting the vessel to her port of destination.

14. Any pilot who shall be unable to leave a vessel under his charge and be carried to sea, without any negligence or fault of his own, or his associates, shall be entitled to two dollars per day, while necessarily absent from home.

15. All passenger steam vessels, regulated by the laws of the United States, and carrying a pilot commissioned by United States commissioners, are exempt from the compulsory payment of pilotage.<sup>1</sup>

16. All national vessels, both inward and outward, shall pay in all ports in the Commonwealth, when they shall employ a pilot, four dollars per foot for fifteen feet or less draught of water, and five dollars per foot for over fifteen feet draught of water.<sup>2</sup>

17. Every regularly appointed pilot is authorized and directed to take charge of any vessels within the limits of his commission, except fishing vessels (not including whaling vessels), all single-decked vessels of three hundred and fifty tons or under, sailing under a coasting license, and all other vessels bound from a port within this State to another port within this State, unless such vessel shall be in the completion of a voyage from a port or place without the State, and steam vessels as per regulation No. 15.

18. Vessels of 200 tons burden and under, and liable to pay pilotage, declining the services of a pilot, shall henceforth be liable only for one half of the regular pilotage fees. And also vessels of less than seven feet draught of water shall be exempt from compulsory pilotage in all ports of the Commonwealth.

[All single-decked vessels of not more than 350 tons, sailing under a coasting license, are exempt from compulsory pilotage, should they decline

<sup>1</sup> By an Order of January 3, 1867, Blue Book, 1867, p. 876, § 15 is amended so as to read: "All passenger steam vessels, regulated by the laws of the United States, sailing under a coasting license, and carrying a pilot, commissioned by United States Commissioners, are exempt from payment of compulsory pilotage."

<sup>2</sup> By an Order of October 23, 1866, Blue Book, 1867, p. 876, § 16 is amended by inserting after the words "All national vessels," the words "except those of the United States." See also *ante*, p. 707.

the services of a pilot. Vessels under 200 tons sailing under a register, shall be held to pay half-pilotage only, should they refuse a pilot. But if any vessel requires the services of a pilot, they shall be paid in accordance with the regular rates. Vessels taking steam by the desire of the masters thereof shall pay the full pilotage; but when steam is taken by direction of the pilot of any vessel, she shall be held to pay 75 per cent of the regular pilotage].

#### SPECIAL REGULATIONS.

*Regulations for the Pilotage of the Harbor of Boston and all Places or Landings accessible to Vessels from Sea included within the Limits of Nahant Rock on the North, and Point Alderton on the South.*

There shall be not less than six pilot boats constantly employed by the Boston pilots; each boat shall have a number, which shall be painted in black figures of not less than 48 inches in length, in the mainsail and jib; the numbers of boats and crews of said boats to be regulated by the commissioners.

Each boat shall have a first and second master, who are required to see that all the pilot regulations are strictly conformed to; any non-performance of duty, or insubordination on the part of any pilot, upon the complaint of any master, will receive prompt investigation by the commissioners.

Each one of the pilot boats employed for the harbor of Boston, in alternate weeks, and in the order of their numbers, shall cruise on a station at the entrance of Boston harbor, outside of Boston light, and within the limits of a line drawn from Minot's Ledge to Nahant Head, and the boat on said station shall at all times show the established pilot boat signal, and shall by day and by night, at all times, remain on said station whenever the weather does not render it impracticable, and be on the lookout for vessels approaching Boston harbor, and shall at all times be furnished with pilots without leaving her station, and shall offer the services of a pilot to all vessels entering said harbor in accordance with the fifth general regulation, and she shall receive on board pilots from outward bound vessels, and render to them all the facilities for their return to the city of Boston which is consistent with their duty. The station boat shall not leave said station until relieved by another boat; and if the boat next in turn for said station shall at any time be unnecessarily absent from said station, the pilots on board of said boat at the time shall collectively be liable to a penalty not exceeding two hundred dollars, the amount and apportionment of which shall be decided by the commissioners, and the pilot or pilots so offending shall be liable to immediate suspension or dismissal from the pilot service at the discretion of the commissioners; but in case of accident or casualty rendering it impossible for said boat to be on her station, the fact

shall be immediately reported to the commissioners, who may order any other boat to take said station, and remain until relieved, said boat being subject to the same liabilities, after receiving said order, as though it was her regular turn. In case of a want of pilots at any time on board of the station boat to supply the demand of inward bound vessels, pilots, taken on board from outward bound vessels may, with the consent of the master of the station boat, go on board of inward bound vessels; but no pilot shall board an inward bound vessel except from the boat to which he belongs, without such permission.

It shall be the duty of every pilot, after having brought a vessel to the inner harbor of Boston, to have such vessel properly moored in the stream, or secured to a wharf (below the bridges), at the option of the master, within twenty-four hours after arrival, weather and tide permitting, without extra charge.

If any vessel outward bound, having a pilot on board, should anchor in Nantasket Roads, it shall be the duty of the pilot to remain on board said vessel, if requested by the master, until the next high water, and if detained after that time, he shall be entitled to receive three dollars per day for each and every day so detained.

No pilot shall leave a vessel outward bound, until to the eastward of George's Island, without permission of the master of said vessel.

Every pilot is required to perform his full share of the duties of an inward, as well as outward pilot, unless prevented by sickness, or causes satisfactory to the commissioners.

*Rates of Pilotage Outward, for the Port of Boston.*

| From November 1 to April 30, inclusive. |          |          | From May 1 to October 31, inclusive. |          |        |
|---|----------|----------|--------------------------------------|----------|--------|
| 7 feet —                                | per foot |          | 7 feet —                             | per foot |        |
| 8                                       | "        | . \$0 95 | 8                                    | "        | . 80   |
| 9                                       | "        | . 1 00   | 9                                    | "        | . 85   |
| 10                                      | "        | . 1 00   | 10                                   | "        | . 90   |
| 11                                      | "        | . 1 05   | 11                                   | "        | . 95   |
| 12                                      | "        | . 1 10   | 12                                   | "        | . 1 00 |
| 13                                      | "        | . 1 15   | 13                                   | "        | . 1 05 |
| 14                                      | "        | . 1 20   | 14                                   | "        | . 1 10 |
| 15                                      | "        | . 1 25   | 15                                   | "        | . 1 15 |
| 16                                      | "        | . 1 30   | 16                                   | "        | . 1 20 |
| 17                                      | "        | . 1 35   | 17                                   | "        | . 1 25 |
| 18                                      | "        | . 1 45   | 18                                   | "        | . 1 30 |
| 19                                      | "        | . 1 50   | 19                                   | "        | . 1 35 |
| 20                                      | "        | . 1 60   | 20                                   | "        | . 1 50 |
| 21                                      | "        | . 2 00   | 21                                   | "        | . 1 75 |
| 22                                      | "        | . 2 50   | 22                                   | "        | . 2 00 |
| 23                                      | "        | . 3 00   | 23                                   | "        | . 2 50 |
| 24                                      | "        | . 4 25   | 24                                   | "        | . 3 50 |
| 25                                      | "        | . 5 00   | 25                                   | "        | . 4 00 |

All national vessels of 15 feet or less draught of water \$4 per foot.<sup>1</sup>

" " " over 15 feet " " \$5 "

<sup>1</sup> See ante, p. 707.

*Rates of Pilotage Inward, for the Port of Boston.*

| From November 1 to April 30, inclusive. |    |      | From May 1 to October 31, inclusive. |    |      |
|---|----|------|--------------------------------------|----|------|
| 7 feet — per foot . . . . .             | \$ | 1 50 | 7 feet — per foot . . . . .          | \$ | 1 20 |
| 8 “ “ “ “ “ “ . . . . .                 |    | 1 50 | 8 “ “ “ “ “ “ . . . . .              |    | 1 30 |
| 9 “ “ “ “ “ “ . . . . .                 |    | 1 55 | 9 “ “ “ “ “ “ . . . . .              |    | 1 30 |
| 10 “ “ “ “ “ “ . . . . .                |    | 1 60 | 10 “ “ “ “ “ “ . . . . .             |    | 1 35 |
| 11 “ “ “ “ “ “ . . . . .                |    | 1 75 | 11 “ “ “ “ “ “ . . . . .             |    | 1 40 |
| 12 “ “ “ “ “ “ . . . . .                |    | 1 80 | 12 “ “ “ “ “ “ . . . . .             |    | 1 45 |
| 13 “ “ “ “ “ “ . . . . .                |    | 1 85 | 13 “ “ “ “ “ “ . . . . .             |    | 1 50 |
| 14 “ “ “ “ “ “ . . . . .                |    | 1 90 | 14 “ “ “ “ “ “ . . . . .             |    | 1 55 |
| 15 “ “ “ “ “ “ . . . . .                |    | 2 00 | 15 “ “ “ “ “ “ . . . . .             |    | 1 65 |
| 16 “ “ “ “ “ “ . . . . .                |    | 2 10 | 16 “ “ “ “ “ “ . . . . .             |    | 1 75 |
| 17 “ “ “ “ “ “ . . . . .                |    | 2 20 | 17 “ “ “ “ “ “ . . . . .             |    | 1 90 |
| 18 “ “ “ “ “ “ . . . . .                |    | 2 50 | 18 “ “ “ “ “ “ . . . . .             |    | 2 00 |
| 19 “ “ “ “ “ “ . . . . .                |    | 2 90 | 19 “ “ “ “ “ “ . . . . .             |    | 2 10 |
| 20 “ “ “ “ “ “ . . . . .                |    | 3 25 | 20 “ “ “ “ “ “ . . . . .             |    | 2 30 |
| 21 “ “ “ “ “ “ . . . . .                |    | 3 80 | 21 “ “ “ “ “ “ . . . . .             |    | 2 75 |
| 22 “ “ “ “ “ “ . . . . .                |    | 4 20 | 22 “ “ “ “ “ “ . . . . .             |    | 3 00 |
| 23 “ “ “ “ “ “ . . . . .                |    | 4 50 | 23 “ “ “ “ “ “ . . . . .             |    | 3 50 |
| 24 “ “ “ “ “ “ . . . . .                |    | 5 00 | 24 “ “ “ “ “ “ . . . . .             |    | 4 00 |
| 25 “ “ “ “ “ “ . . . . .                |    | 5 00 | 25 “ “ “ “ “ “ . . . . .             |    | 4 50 |

All national vessels of 15 feet or less draught of water, \$4 per foot.<sup>1</sup>

“ “ “ “ over 15 feet “ “ \$5 “

Any commissioned pilot that shall offer his services to any vessel bound into the harbor of Boston, without or eastward of a line drawn from Manomet Land, Plymouth, to Thacher's Island, Cape Ann, from the first day of November to the thirtieth day of April, inclusive, shall be entitled to receive twenty per cent in addition to the foregoing rates.

The fees for hauling a vessel from the stream to a wharf (below the bridges) after the expiration of twenty-four hours from arrival shall be four dollars; and for hauling a vessel from the wharf to the stream, provided the vessel does not proceed to sea within twenty-four hours from the time of anchoring, four dollars.

If any commissioned pilot offers himself to any inward bound vessel, liable to take a pilot, outside of a line drawn from Harding's Rocks to the Graves and Bass Point, and the master of the vessel should refuse to take such pilot on board, the master or owner of such vessel or either of them shall be liable to such pilot for the regular pilotage, as if his services had been accepted.<sup>2</sup>

<sup>1</sup> See ante, p. 707.

<sup>2</sup> The following amendatory Order was passed November 2, 1866: "By substituting wherever the words occur 'a line drawn from Harding's Rocks to the Graves and Bass Point,' the words 'a line drawn from Point Alderton to Eastern Point, outer Brewster Island, thence to Eastern Point, Green Island, and thence to Bass Point.'"

This order has not been published in the Blue Book, but we have examined the original on file in the secretary of state's office and find it to be authentic.

It was duly proclaimed as directed by the 17th section of the act.

Not less than three pilot boats shall at all times cruise in Boston Bay outside of the limits prescribed for the station boat.

Every commissioned pilot for Boston Bay shall be attached to a pilot boat, and no pilot shall remain unattached for more than thirty days, without permission from the commissioners. Any pilot neglecting or refusing to join a pilot boat for ten days after being duly notified to join one, unless satisfactory reasons are given for non-compliance, shall be liable to suspension, or to have his commission revoked at the option of the commissioners.

No pilot shall take charge of any vessel of a larger draught of water than his commission authorizes, nor shall any other person, not having a commission, be put on board of any vessel from either of the pilot boats in the capacity of pilot. But in the event of the master of any vessel taking on board an unauthorized person to assist him in going into port, the person so taken shall state the circumstances to the master of said vessel, and keep the usual signal flying for a pilot until within a line from the Harding's Rocks to the Graves and Bass Point, and shall give the vessel up to any authorized pilot who may offer himself.

Any vessel inward bound, requiring the services of a pilot when inside of a line drawn from Boston Light House to Point Alderton in the Light House Channel, or when abreast of or inside of the outer Brewster Island, in Broad Sound, shall be liable only to two thirds of the established rates of pilotage, and if outward bound from Nantasket or President Roads, half pilotage rates only.

#### BAY PILOTAGE — SOUTH SHORE.

The rates for piloting from west of a line drawn from Saugkonnet Point to Noman's Land, to the ports herein named, shall be as follows, viz. : — Into Tarpaulin Cove, one dollar and fifty cents per foot ; Wood's Hole, Falmouth Port, and Holmes' Hole, one dollar and seventy-five cents per foot. Into Edgartown and Hyannis, two dollars per foot ; and to the bar of Nantucket Harbor, two dollars and twenty-five cents per foot. And into any other ports on the south coast of Barnstable County or on the Vineyard Sound, one dollar and seventy-five cents per foot.

The outward rates of pilotage from all the above-named ports and from the bar of Nantucket harbor, if taken westward past Gay Head, shall be three fourths of the above ; and the outward and inward rates shall be increased by twenty per cent for all piloting done between the first day of November and the thirtieth day of April, inclusive.

The rates for piloting vessels into any of the above-named ports, and to the bar of Nantucket harbor, from any point east of a line drawn from Saugkonnet Point to Noman's Land, and between said line and a line drawn due south from Tarpaulin Cove lighthouse, shall be twenty-five per



cent less than the above-named rates ; and if said pilot is taken east of a line drawn due south from Tarpaulin Cove lighthouse, fifty per cent shall be deducted from said specified rates ; and in case the master then declines taking a pilot, said pilot offering shall be entitled to one-quarter pilotage, agreeably to these regulations ; and if no pilot shall have offered his services before passing a line drawn from the West Chop lighthouse to the Nobska lighthouse, there shall be no obligation on the part of the master or owner to pay pilotage, if the master shall then decline receiving a pilot.

The rates of pilotage for vessels coming from the eastward, bound to the aforesaid ports, shall be from east of a line drawn due north from Nantucket Great Point lighthouse to the bar of Nantucket, one dollar and fifty cents per foot of said vessel's draught. Into Edgartown and Hyannis, one dollar and seventy-five cents per foot. Into Holmes' Hole, Falmouth Port, and Wood's Hole, two dollars per foot ; and into all other ports on the south coast of Barnstable County or on the Vineyard Sound, one dollar and seventy-five cents per foot ; and from west of said line drawn due north from Great Point lighthouse, twenty five per cent less than the foregoing. The outward rates, when passing to sea to eastward of Nantucket Shoals, shall be three fourths of the inward rates, and both outward and inward rates shall be increased by twenty-five per cent for all pilotage done between the first of November and the thirtieth of April, inclusive.

Any commissioned pilot for the harbor of Boston, that may be found mating or combining, or in any way interested with any other pilot in the business of pilotage, except with those pilots belonging to the same boat with himself, shall be liable to forfeit his commission.

The established pilot signal by day is a white and blue flag, white next to the mast ; and in the night a red light.

In the division of earnings of any pilot boat among the crew, the following allowance shall be made to those pilots holding a commission for a limited draught of water.

For a commission for 10 feet draught of water, one third of a share.

|   |   |    |   |   |               |   |
|---|---|----|---|---|---------------|---|
| " | " | 12 | " | " | one half      | " |
| " | " | 14 | " | " | two thirds    | " |
| " | " | 16 | " | " | three fourths | " |

The pilots of the port of Boston shall have an office, or keep a desk in some counting-room, in some central situation, where all communications may be left for them, and it shall be the duty of the pilots, when in Boston, to call at said office or desk twice a day at least.

## REGULATIONS FOR THE PILOTAGE

*Of Nantucket Shoals, Vineyard Sound, and Ports bordering thereon, and also for Buzzard's Bay and Harbors bordering on its waters.*

The rates for piloting vessels through the Vineyard Sound over Nantucket Shoals into Boston Bay, or to any port of destination eastward thereof, if the pilot be taken westward of a line drawn due south from Tarpaulin Cove lighthouse, or between said line and a line drawn from Noman's Land to Saugkonnet Point, from the first day of November to the thirtieth day of April, inclusive, shall be for vessels not drawing more than eleven feet of water, three dollars and fifty cents per foot; if drawing more than eleven feet of water, and not more than fourteen feet, four dollars per foot; if drawing more than fourteen feet, four dollars and fifty cents per foot. And from the first day of May to the thirty-first day of October, inclusive, for vessels drawing not more than eleven feet of water, two dollars and fifty cents per foot; if drawing more than eleven feet, and not more than fourteen feet, three dollars per foot; if drawing more than fourteen feet, three dollars and fifty cents per foot. And if the pilot be taken west of said line, drawn from Saugkonnet Point to Noman's Land, ten per cent shall be added to the above specified rates; and if said pilot be taken at any point east of said line, drawn due south from Tarpaulin Cove lighthouse, ten per cent shall be deducted from said rates; and if, during the navigation aforesaid, the pilot is detained in any port at the request of the master, commander, or owner of said vessel, and not from stress of weather, he shall be allowed three dollars per day for all such detention; and in all cases five dollars shall be added to the rates aforesaid, if the vessel shall be taken to a port of destination east of Cape Ann, and not eastward of Portsmouth; and if the port of destination be Portsmouth, or eastward thereof, ten dollars shall be added to said rates: *Provided, however*, that any other rates may be agreed upon, by written contract between the master, commander, or owner of any vessel to be piloted and the pilot taking charge of the vessel.

The rates of pilotage from one port to another on the Vineyard Sound, including the south coast of Barnstable County, and from the said ports to the bar of Nantucket harbor, and *vice versa*, shall be uniformly one dollar and twenty-five cents per foot, and twenty-five per cent additional for all pilotage done between the first day of November and the thirtieth day of April, inclusive. And for pilotage inward or outward over the bar of Nantucket harbor only, at all seasons of the year, one dollar per foot.

Any person holding a commission as pilot for Nantucket Shoals is authorized to pilot vessels from any part of the Vineyard Sound, Nantucket Shoals, and ports bordering on the waters of the same, to the harbor pilots'

limits of any port in Buzzard's Bay or ports west of said bay, at the following rates of pilotage: From any point east of a line drawn due north from Cape Poge, at two dollars per foot of such vessel's draught, and if taken westward of said line, drawn due north from Cape Poge, one dollar and fifty cents per foot; and if no port pilot offers his services, with the consent of the master, they may proceed with said vessel to her destination, and claim the whole amount of pilotage: *Provided, however*, that no vessel passing through the waters of the Vineyard Sound, or over the Nantucket Shoals to ports beyond them, shall be holden to pay compulsory pilotage. But in no case shall an unauthorized pilot take charge of any vessel when a commissioned pilot can be obtained at a proper time. Pilots holding commissions for Vineyard Sound and Nantucket Shoals, who may have piloted a vessel over said shoals, whose destination is a port in Barnstable or Boston Bay, or eastward thereof, on arrival at the port of her destination, and no harbor pilot offering his services, may, with the consent of the master (but not otherwise), pilot such vessel into her port of destination, and receive the regular port pilot fees therefor.

#### NEW BEDFORD AND FAIRHAVEN.<sup>1</sup>

Pilots especially commissioned for the purpose shall be authorized to pilot vessels from sea, which are bound into the ports of New Bedford and Fairhaven to abreast of Clark's Point lighthouse and to the port pilot limits of other ports in Buzzard's Bay (or westward thereof), and if no port pilot offers his services, they may, with the consent of the master or owner, proceed with such vessel to her port of destination, and claim the full amount of pilotage.

The rates of pilotage from sea from vessels bound into the ports of New Bedford and Fairhaven to abreast of Clark's Point lighthouse, shall be one dollar and ninety cents per foot, and from abreast of Clark's Point lighthouse to the inner harbors of New Bedford and Fairhaven, thirty-five cents per foot, and twenty per cent additional to the sea or bay pilotage, from the first day of November to the thirtieth day of April, when a pilot offers

<sup>1</sup> May 12, 1864, the following order was passed: "That for the period of one year from date the rates for pilotage, as provided in Chapter 176 of the Acts of 1862, be so amended that the pilotage from the ports of New Bedford and Fairhaven to Clark's Point lighthouse, both inward and outward, shall be fifty cents per foot, instead of thirty-five cents, as is now provided, and that the pilotage from the sea inward to abreast of Clark's Point lighthouse shall be two dollars and twenty-five cents per foot instead of one dollar and ninety cents, as is now provided." In the Blue Book for 1867, p. 876, the date of this order is given incorrectly, as we find by examination of the original on file in the Secretary of State's office.

his services or is taken west of a line drawn from Saugkonnet Point, to the south point of Noman's Land.

The outward rates of pilotage from the ports of New Bedford and Fairhaven to abreast of Clark's Point lighthouse shall be thirty-five cents per foot, from abreast Clark's Point lighthouse to sea, one dollar and fifty cents per foot.

Vessels bound into other ports (than New Bedford and Fairhaven) in Buzzard's Bay, and ports west of said bay, are exempt from paying compulsory bay pilotage, when coming from sea, from westward to the port pilot limits of the several ports; but if a pilot is employed, he shall be entitled to receive two dollars per foot, and if no port pilot offers his services, he may, with the consent of the master or owner, conduct said vessel to the port of her destination and claim the whole amount of pilotage.

The rates of port or harbor pilotage for all the different ports bordering on Buzzard's Bay, and to the westward thereof, excepting New Bedford and Fairhaven, shall be for vessels inward bound drawing less than twelve feet of water, one dollar per foot; for those drawing from twelve to fifteen feet of water inclusive, one dollar and thirty cents per foot; for those drawing more than fifteen, and not more than eighteen feet of water, two dollars per foot; and for those drawing over eighteen feet of water, two dollars and fifty cents per foot; and the rates of pilotage for vessels outward bound from said ports shall be three quarters of said inward rates, and both outward and inward rates shall be increased by twenty per cent for all pilotage done between the first day of November and the thirtieth day of April, inclusive.

#### REGULATIONS AND FEES OF PILOTAGE

*Applicable to the following Harbors, viz.: Provincetown, Plymouth, Newburyport, Gloucester, Rockport, Lane's Cove, Annisquam, Salem and Beverly, Marblehead, Taunton River, Merrimack River and Harbors, Dorchester and Neponset, Hingham, Weymouth and Quincy, Lynn, Mystic and Charles Rivers.*

*Provincetown.* — There shall be commissioned from the port of Provincetown not more than six persons, who shall be competent as bay and harbor pilots, (and who shall keep a decked boat, suitable for the purpose, not less than fifty tons),<sup>1</sup> and shall cruise in all seasons, for the purpose of taking vessels into Provincetown or Cape Cod harbor. Said pilots shall also be entitled to take vessels, when outside the limits of the line hereinafter defined, to or within said limits, or until spoken by a Boston pilot. Vessels bound into the port of Boston, and liable to pay pilotage, will take such pilots, when first spoken by them, and said pilots shall have authority to pilot any such vessels until spoken by a Boston pilot, when the vessel shall be given

<sup>1</sup> Repealed, Act of 1868, c. 180.

up to the first pilot commissioned for the port of Boston who may hail her ; but the Cape pilot shall continue on board until relieved by a Boston pilot, to whom the vessel shall be given up ; and the pilotage of such vessel shall be divided between the two pilots, *pro rata*, in proportion to the distance each may have charge of her, after passing a line drawn from Plymouth Lights to Thacher's Island, Cape Ann, in which event distance-money shall be wholly for the benefit of the Cape pilots, — otherwise for the Boston pilots ; but the compensation of the first pilot shall in no case be less than five dollars, which amount shall be deducted from the regular pilotage, so that in no instance shall there be any addition to the usual rates of pilotage in consequence of taking such Cape pilots.

The limits outside of which such Cape Cod or Provincetown pilots may take a vessel bound into Boston shall be a line drawn northeast from the Gurnet or Plymouth Lights ; but all commissioned pilots for the port of Boston shall have the privilege of cruising outside of said line, as heretofore.

Vessels coming by Cape Cod and bound for the ports of Salem, Beverly, or Marblehead, who may desire the services of a Cape pilot, may take such pilot as may be competent, to the several ports or pilots, under the same restrictions as are provided for vessels bound to Boston, as above.

The rates of pilotage for all vessels liable to pay pilotage bound into the harbor of Provincetown, if taken south of a line drawn due west from Race Point lighthouse, or between that and a line drawn due south from Wood End Bar, shall be for vessels drawing less than twelve feet of water, one dollar per foot ; for those drawing from twelve to fifteen feet of water, inclusive, one dollar and thirty cents per foot ; for those drawing more than fifteen feet, and not more than eighteen feet of water, two dollars per foot ; for those drawing more than eighteen feet, and not more than twenty-one feet of water, two dollars and fifty cents per foot ; for those drawing more than twenty-one feet, and not more than twenty-five feet of water, three dollars and fifty cents per foot, and no more. But no vessel shall be liable to pay compulsory pilotage if the services of a pilot are refused after passing a line drawn due south from Wood End Bar. And the outward rates of pilotage shall be three fourths the amount of said inward rates.

*Plymouth.* — The rates of pilotage for vessels liable to pay pilotage bound into the harbor of Plymouth shall be one dollar per foot. Vessels arriving inside of the Gurnet, and no pilot previously offering his services, are exempt from compulsory pilotage, if a pilot's services are then refused. Rate of pilotage outward, seventy-five cents per foot.

*Newburyport.* — The rates of pilotage for vessels liable to pay pilotage bound into or out of the harbor of Newburyport shall be, for outward bound vessels, from seven to twelve feet draught of water, sixty-five cents per foot ; from twelve to fifteen feet, inclusive, eighty-five cents per foot ;

upwards of fifteen feet, one dollar and five cents per foot. The summer rates of pilotage for inward bound vessels, drawing from seven to under twelve feet, ninety-five cents per foot; from twelve to fifteen feet, inclusive, one dollar and twenty-five cents per foot; over fifteen feet, one dollar and sixty cents per foot. The winter rates of pilotage for inward bound vessels, drawing from seven to twelve feet of water, one dollar and twenty-five cents per foot; from twelve to fifteen feet, inclusive, one dollar and sixty-five cents per foot; over fifteen feet, two dollars and ten cents per foot.

The district limits of the port of Newburyport shall be, from Chebacco Bar, on the south, to the Isle of Shoals, on the north. Vessels not spoken until within the bar shall pay only half pilotage; if not spoken until within the Black Rocks, shall pay no compulsory pilotage.

The pilots of Newburyport will be required to keep one or more good decked boats, and one boat shall be upon the cruising-ground at all times, when the weather will permit.

*Rockport, Lane's Cove, and Annisquam.* — The rates of pilotage shall be, for vessels under twelve feet draught of water, seventy-five cents per foot; of twelve to fifteen feet, inclusive, one dollar per foot; over fifteen feet, one dollar and fifty cents per foot.

The inward and outward rates shall be same.

*Gloucester.* — The rates of pilotage for vessels liable to pay pilotage bound into the harbor of Gloucester shall be, for vessels drawing less than twelve feet of water, one dollar per foot; for those drawing from twelve to fifteen feet of water, inclusive, one dollar and thirty cents per foot; for those drawing more than fifteen feet, and not more than eighteen feet of water, two dollars per foot; for those drawing more than eighteen feet, and not more than twenty-one feet of water, two dollars and fifty cents per foot; for those drawing more than twenty-one feet, and not more than twenty-five feet of water, three dollars and fifty cents per foot, and no more. The harbor line shall be a line drawn from Norman's Woe to Dog Bar Buoy, off Eastern Point, within which line there shall be no compulsory inward pilotage. The pilots of Gloucester will be required to keep at least one decked boat, and said boat or boats shall be upon the cruising-ground at all times when the weather will permit. The pilotage on vessels outward bound shall be three fourths of the inward rates.

*Salem and Beverly.* — The pilots for the ports of Salem and Beverly, shall keep one or more good decked boats, and shall cruise for the purpose of bringing vessels into said ports, whenever the weather does not render it impracticable.

The harbor lines of the ports of Salem and Beverly shall be a line running north by east from Half-Way Rock to the northern shore, and a line

running northwesterly from Half-Way Rock to Marblehead Fort, within which lines there shall be no compulsory inward pilotage. The rates for pilotage, both for inward and outward bound vessels, shall be as follows, viz.: For vessels drawing less than nine feet of water, ninety-five cents per foot; for nine feet and less than eleven feet, one dollar and ten cents per foot; for eleven feet, and less than thirteen feet, one dollar and thirty cents per foot; for thirteen feet and less than fifteen feet, one dollar and fifty cents per foot; for fifteen feet and less than seventeen feet, one dollar and seventy-five cents per foot; for seventeen feet and upwards, one dollar and ninety-five cents per foot. Any Salem and Beverly pilot having brought a vessel in shall have such vessel properly moored in the harbor, or secured at the wharf, at the option of the master, within twelve hours after the arrival of said vessel, if the weather permits, without extra charge; but, if called upon after the expiration of the twelve hours, to haul any vessel into the wharf, the pilot shall be entitled to receive two dollars for his services, and the same sum for taking a vessel from the wharf into the harbor, if said vessel shall not proceed to sea within twelve hours from the time of her being anchored in the harbor. The signal for the pilot boats for the ports of Salem and Beverly shall be their accustomed signal by day, viz.: a red flag with a white P, and a black ball painted on the upper part of mainsail and jib; and by night a green light.

*Marblehead.* — The rates of pilotage for vessels liable to pay pilotage bound into the harbor of Marblehead shall be for vessels drawing from seven to eleven feet of water, sixty-seven cents per foot; from twelve to fourteen feet, ninety cents per foot; from fifteen to seventeen feet, one dollar and twenty cents per foot; eighteen feet and upwards, one dollar and sixty cents per foot.

The harbor limits of Marblehead shall be bounded by a line drawn from the south point of the Neck to Marblehead Rock, thence to Cat Island Rock, and thence westerly to Gerry's Island; within this line there shall be no compulsory inward pilotage. The outward rates shall be the same as the inward.

*Taunton River.* — The pilotage for Taunton River shall not be compulsory. When the services of a pilot are required, the rates of pilotage on all vessels piloted from Fall River to Somerset, drawing not over twenty feet of water, two dollars. From Fall River to Dighton, on vessels drawing twelve feet of water, seven dollars; eleven feet, six dollars, and fifty cents; ten feet, six dollars; nine feet, five dollars and fifty cents; eight feet, five dollars; under eight feet, four dollars. From Somerset to Dighton and Berkley, fifty cents per foot for vessels drawing from eight to twelve feet of water; under eight feet, three dollars per vessel. The downward pilotage from the aforesaid places shall be one half of the upward rates.

*Merrimack River and Harbors.* — The pilotage on the Merrimack River, between Newburyport and Haverhill shall not be compulsory. When the services of a pilot are required, the rates of pilotage authorized by the commissioners shall be, between Newburyport and ship-yards at Bellville, thirty cents per foot; between Newburyport and Salisbury, fifty cents per foot; between Newburyport and Amesbury, sixty-two and one half cents per foot; between Newburyport and Groveland, eighty-seven and one half cents per foot; between Newburyport and Haverhill, one dollar per foot.

*Dorchester and Neponset.* — The pilotage for the several landing-places in the towns of Dorchester and Neponset shall not be compulsory. When the services of a pilot are required, and are offered outside of a line drawn from the wharf on Thompson's Island in a direct line to Dorchester Point, the rates of pilotage authorized by the commissioners shall be, viz.: to Commercial Point, thirty cents per foot; to Neponset, forty cents per foot. The inward and outward rates to be the same.

*Hingham, Weymouth, and Quincy.* — The pilotage for the several landing-places in the towns of Hingham, Weymouth, and Quincy, below the bridges, shall not be compulsory. When the services of a pilot are required and are offered outside of a line drawn from Nantasket Point to the east point of Pettick's Island, from thence a line drawn to the northwest point of said Pettick's Island, from thence in a line to Sunk Island, from Sunk Island in a direct line to Hangman's Island. The rates of pilotage authorized by the commissioners shall be, viz.: To Hingham, fifty cents per foot, for vessels drawing ten feet and under; eleven and twelve feet, sixty cents per foot. To Weymouth, Braintree, or Quincy Point, ten feet and under, fifty cents per foot; eleven and twelve feet, sixty cents per foot; thirteen feet, seventy-five cents per foot; fourteen feet one dollar per foot; fifteen feet, one dollar and ten cents per foot; sixteen feet, one dollar and twenty-five cents per foot; to East Weymouth, ten feet and under, sixty cents per foot; eleven feet, sixty-five cents per foot; twelve feet, seventy cents per foot; thirteen feet, eighty-five cents per foot; fourteen feet, one dollar per foot; over fourteen feet, one dollar and twenty-five cents per foot. The inward and outward rates to be the same.

*Lynn.* — The pilotage for the harbor of Lynn shall not be compulsory. When the services of a pilot are required, the rates of pilotage shall be, viz.: To Lynn, on vessels drawing twelve feet or less of water, three dollars per vessel; to West Lynn, three dollars per vessel. Up the river through bridges, four dollars per vessel. The outward rates shall be one half of said inward rates.

*Mystic River.* — The pilotage for Mystic River shall not be compulsory. When the services of a pilot are required, the rates of pilotage shall be, viz.: From outside of Chelsea Bridge in Boston Harbor to Charlestown



Neck or Malden Bridge, thirty-five cents per foot ; to South Malden, fifty cents per foot ; from Malden Bridge or either of the railroad bridges to Medford, Malden, or Edgeworth, five dollars per vessel. The upward and downward rates to be the same.

*Charles River.* — The pilotage on the Charles River, from outside of Charlestown Bridge, in Boston harbor, shall not be compulsory when the services of a pilot are required. The rates of pilotage shall be : —

*From outside of Charlestown Bridge, in Boston Harbor, to Fitchburg Railroad Wharf, viz. :*

|                                |                    |
|--------------------------------|--------------------|
| 10 feet and under, . . . . .   | 25 cents per foot. |
| 11 to 13 feet, . . . . .       | 30 " "             |
| 14 feet and upwards, . . . . . | 35 " "             |

*To Landings within State Prison Bridge.*

|                              |                    |
|------------------------------|--------------------|
| 11 feet and under, . . . . . | 40 cents per foot. |
|------------------------------|--------------------|

*To Craigie's Bridge, including Lowell Railroad Wharves.*

|                                |                    |
|--------------------------------|--------------------|
| 10 feet and under, . . . . .   | 35 cents per foot. |
| 11 to 13 feet, . . . . .       | 40 " "             |
| 14 feet and upwards, . . . . . | 45 " "             |

*To Landings between Craigie's and Cambridge Bridges, including all Landings in Cambridgeport.*

|                              |                    |
|------------------------------|--------------------|
| 11 feet and under, . . . . . | 40 cents per foot. |
|------------------------------|--------------------|

*From Cambridge Bridge to Willard's Bridge, in addition to the above rates.*

|                              |                    |
|------------------------------|--------------------|
| 11 feet and under, . . . . . | 60 cents per foot. |
|------------------------------|--------------------|

*From Cambridge Bridge to Brighton Corner.*

|                             |                    |
|-----------------------------|--------------------|
| 9 feet and under, . . . . . | \$ 6 per vessel.   |
| 10 and 11 feet, . . . . .   | 75 cents per foot. |
| 12 feet, . . . . .          | 80 " "             |
| 13 feet, . . . . .          | 85 " "             |

The upward and downward rates to be the same.

#### REGULATIONS FOR STATION BOATS IN BOSTON HARBOR.

Pilot Boat, No. 1, will take her station as prescribed by the regulations for the port of Boston, and remain on said station one week, when Pilot Boat, No. 2, will take said station. And each successive Monday, said station will be taken by the pilot boats, in the order of their numbers.

APPROVED, April 30, 1862.

## RULES OF PRACTICE

OF THE COURTS OF THE UNITED STATES IN CAUSES OF ADMIRALTY AND MARITIME JURISDICTION, ON THE INSTANCE SIDE OF THE COURT, IN PURSUANCE OF THE ACT OF 23D OF AUGUST, 1842, C. 188.<sup>1</sup>

## I.

No mesne process shall issue from the district court in any civil cause of admiralty and maritime jurisdiction until the libel or libel of information shall be filed in the clerk's office, from which such process is to issue. All process shall be served by the marshal or by his deputy, or where he or they are interested, by some discreet and disinterested person appointed by the court.

## II.

In suits *in personam*, the mesne process may be by a simple *warrant of arrest* of the person of the defendant in the nature of a *capias*, or by a *warrant of arrest* of the person of the defendant with a clause therein, that if he cannot be found, to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein; or, by a simple *monition* in the nature of a summons to appear and answer to the suit, as the libellant shall, in his libel or information, pray for, or elect.

## III.

In all suits *in personam*, — where a simple warrant of arrest issues and is executed, the marshal may take bail with sufficient sureties from the party arrested by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered there in the court to which the process is returnable or in any appellate court. And upon such bond or stipulation, summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable to enforce the final decree so rendered, or upon appeal, by the appellate court.

## IV.

In all suits *in personam*, where goods and chattels, or credits and effects

<sup>1</sup> These rules are printed in 3 Howard.

are attached under such warrant authorizing the same, the attachment may be dissolved by order of the court to which the same warrant is returnable, upon the defendant, whose property is so attached, giving a bond or stipulation with sufficient sureties to abide by all orders, interlocutory or final, of the court, and pay the amount awarded by the final decree rendered in the court to which the process is returnable, or in any appellate court; and upon such bond or stipulation summary process of execution shall and may be issued against the principal and sureties by the court to which such warrant is returnable, to enforce the final decree so rendered, or upon appeal, by the appellate court.

## V.

Bonds or stipulations in admiralty suits may be given and taken in open court, or at chambers, or before any commissioner of the court, who is authorized by the court to take affidavits of bail and depositions in cases pending before the court.

## VI.

In all suits *in personam*, where bail is taken, the court may, upon motion for due cause shown, reduce the amount of the sum contained in the bond or stipulation therefor; and in all cases where a bond or stipulation is taken as bail, or upon dissolving an attachment of property as aforesaid, if either of the sureties shall become insolvent pending the suit, new sureties may be required by the order of the court to be given, upon motion and due proof thereof.

## VII.

In suits *in personam*, no warrant of arrest, either of the person or property of the defendant, shall issue for a sum exceeding five hundred dollars, unless by the special order of the court upon affidavit or other proper proof showing the propriety thereof.

## VIII.

In all suits *in rem* against a ship, her tackle, sails, apparel, furniture, boats, or other appurtenances, if such tackle, sails, apparel, furniture, boats, or other appurtenances are in the possession or custody of any third person, the court may, after a due monition to such third person, and a hearing of the cause, if any, why the same should not be delivered over, award and decree that the same be delivered into the custody of the marshal or other proper officer, if upon the hearing the same is required by law and justice.

## IX.

In all cases of seizure and in other suits and proceedings *in rem*, the process, unless otherwise provided for by statute, shall be by a warrant of arrest of the ship, goods, or other thing to be arrested, and the marshal shall thereupon arrest and take the ship, goods, or other thing into his possession for safe custody; and shall cause public notice thereof and of the time assigned for the return of such process and the hearing of the cause, to be given in such newspaper within the district as the district court shall order, and if there is no newspaper published therein, then in such other public places in the district as the court shall direct.

## X.

In all cases where any goods or other things are arrested, if the same are perishable, or are liable to deterioration, decay, or injury by being detained in custody, pending the suit, the court may, upon the application of either party, in its discretion order the same, or so much thereof to be sold as shall be perishable or liable to depreciation, decay, or injury, and the proceeds or so much thereof as shall be a full security to satisfy in decree to be brought into court, to abide the event of the suit; or the court may, upon the application of the claimant, order a delivery thereof to him upon a due appraisement to be had under its direction, either upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with the sureties in such sum as the court shall direct to abide by and pay the money awarded by the final decree rendered by the court or the appellate court, if any appeal intervenes, as the one or the other course shall be ordered by the court.

## XI.

In like manner where any ship shall be arrested, the same may, upon the application of the claimant, be delivered to him upon a due appraisement to be had under the direction of the court, upon the claimant's depositing in court so much money as the court shall order, or upon his giving a stipulation with sureties as aforesaid; and if the claimant shall decline any such application, then the court may in its discretion, upon the application of either party, upon due cause shown, order a sale of such ship, and the proceeds thereof to be brought into court, or otherwise disposed of as it may be deemed most for the benefit of all concerned.

## XII.

In all suits by material men for supplies or repairs, or other necessities for a foreign ship or for a ship in a foreign port, the libellant may

proceed against the ship and freight *in rem*, or against the master or owner alone *in personam*. And the like proceeding *in personam*, but not *in rem*, shall apply to cases of domestic ships, for supplies, repairs, or other necessities.<sup>1</sup>

### XIII.

In all suits for mariners' wages, the libellant may proceed against the ship, freight, and master, or against the ship and freight, or against the owner or master alone *in personam*.

### XIV.

In all suits for pilotage, the libellant may proceed against the ship and master, or against the ship, or against the owner alone, or the master alone, *in personam*.

### XV.

In all suits for damage by collision the libellant may proceed against the ship and master, or against the ship alone, or against the master or the owner alone, *in personam*.

### XVI.

In all suits for an assault or beating on the high seas or elsewhere within the admiralty and maritime jurisdiction, the suit shall be *in personam* only.

### XVII.

In all suits against the ship or freight founded upon a mere maritime hypothecation, either express or implied, of the master for moneys taken up in a foreign port for supplies or repairs or other necessities for the voyage, without any claim of marine interest, the libellant may proceed either *in rem* or against the master or the owner alone *in personam*.

### XVIII.

In all suits on bottomry bonds, properly so called, the suit shall be *in*

<sup>1</sup> This is the new Twelfth Rule, which went into effect May 1, 1859. 21 How. iv. The old rule was as follows: "In all suits by material men for supplies or repairs or other necessities for a foreign ship or for a ship in a foreign port, the libellant may proceed against the ship and freight *in rem*, or against the master or the owner alone *in personam*. And the like proceeding *in rem* shall apply to cases of domestic ships, where by the local law a lien is given to material men for supplies, repairs, or other necessities."

*rem* only against the property hypothecated, or the proceeds of the property in whosoever hands the same may be found, unless the master has without authority given the bottomry bond, or by his fraud or misconduct has avoided the same, or has subtracted the property, or unless the owner has by his own misconduct or wrong lost or subtracted the property, in which latter cases the suit may be *in personam* against the wrong-doer.

## XIX.

In all suits for salvage, the suit may be *in rem* against the property saved, or the proceeds thereof, or *in personam* against the party at whose request and for whose benefit the salvage service has been performed.

## XX.

In all petitory or possessory suits between part-owners or adverse proprietors, or by the owners of a ship or the majority thereof against the master of a ship for the ascertainment of the title and delivery of the possession, or for the possession only, or by one or more part-owners against the others to obtain security for the return of the ship from any voyage undertaken without their consent, or by one or more part-owners against the others to obtain possession of the ship for any voyage upon giving security for the safe return thereof, the process shall be by an arrest of the ship and by a monition to the adverse party or parties to appear and make answer to the suit.

## XXI.

March 24, 1862. "Ordered that the 21st Rule in Admiralty be abolished, and that the following be substituted in its place:—

"In all cases of a final decree for the payment of money, the libellant shall have a writ of execution in the nature of a *fiery facias*, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands and tenements, or other real estate of the defendant or stipulators."<sup>1</sup>

<sup>1</sup> 1 Black, 6. The original rule was as follows:—

In all cases where the decree is for the payment of money, the libellant may, at his election, have an attachment to compel the defendant to perform the decree, or a writ of execution in the nature of a *capias* and of a *fiery facias*, commanding the marshal or his deputy to levy the amount thereof of the goods and chattels of the defendant, and for want thereof to arrest his body to answer the exigency of the execution. In all other cases the decree may be enforced by an attachment to compel the defendant to perform the decree; and upon such attachment the defendant may be arrested and committed to prison until he performs the decree, or is otherwise discharged by law, or by the order of the court.

## XXII.

All informations and libels of information upon seizures for any breach of the revenue or navigation or other laws of the United States, shall state the place of seizure, whether it be on land, or on the high seas, or on navigable waters within the admiralty and maritime jurisdiction of the United States; and the district within which the property is brought and where it then is. The information or libel of information shall also propound in distinct articles the matters relied on as grounds or causes of forfeiture, and aver the same to be contrary to the form of the statute or statutes of the United States in such case provided, as the case may require, and shall conclude with a prayer of due process to enforce the forfeiture and to give notice to all persons concerned in interest to appear and show cause at the return-day of the process why the forfeiture should not be decreed.

## XXIII.

All libels in instance causes, civil or maritime, shall state the nature of the cause, as for example, that it is a cause civil and maritime, of contract, or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be, and if the libel be *in rem*, that the property is within the district; and if *in personam*, the names and occupations and places of residence of the parties. The libel shall also propound and articulate in distinct articles the various allegation of facts, upon which the libellant relies in support of his suit, so that the defendant may be enabled to answer distinctly and separately the several matters contained in each article; and it shall conclude with a prayer of the process to enforce his rights *in rem*, or *in personam* (as the case may require), and for such relief and redress as the court is competent to give in the premises. And the libellant may further require the defendant to answer on oath all interrogatories propounded by him touching all and singular the allegations in the libel at the close or conclusion thereof.

## XXIV.

In all informations and libels in causes of admiralty and maritime jurisdiction, amendments in matters of form may be made at any time on motion to the court as of course. And new counts may be filed and amendments in matters of substance may be made upon motion at any time before the final decree upon such terms as the court shall impose. And where any defect of form is set down by the defendant upon special exceptions, and is allowed, the court may, in granting leave to amend, impose terms upon the libellant.

## XXV.

In all cases of libels *in personam*, the court may in its discretion, upon the appearance of the defendant, where no bail has been taken and no attachment of property has been made to answer the exigency of the suit, require the defendant to give a stipulation with sureties in such sum as the court shall direct, to pay all costs and expenses, which shall be awarded against him in the suit upon the final adjudication thereof, or by any interlocutory order in the process of the suit.

## XXVI.

In suits *in rem*, the party claiming the property shall verify his claim on oath or solemn affirmation, stating that the claimant, by whom or on whose behalf the claim is made, is the true and *bona fide* owner, and that no other person is the owner thereof. And where the claim is put in by an agent or consignee, he shall also make oath, that he is duly authorized thereto by the owner, or if the property be at the time of the arrest in the possession of the master of a ship, that he is the lawful bailee thereof for the owner. And upon putting in such claim, the claimant shall file a stipulation with sureties in such sum as the court shall direct, for the payment of all costs and expenses which shall be awarded against him by the final decree of the court, or upon an appeal, by the appellate court.

## XXVII.

In all libels in causes of civil and maritime jurisdiction, whether *in rem* or *in personam*, the answer of the defendant to the allegations in the libel shall be on oath or solemn affirmation ;<sup>1</sup> and the answer shall be full and explicit and distinct to each separate article and separate allegation in the libel, in the same order as numbered in the libel ; and shall also answer in like manner each interrogatory propounded at the close of the libel.

## XXVIII.

The libellant may except to the sufficiency or fulness or distinctness or relevancy of the answer to the articles and interrogatories in the libel ; and if the court shall adjudge the same exceptions or any of them to be good and valid, the court shall order the defendant forthwith within such time as the court shall direct, to answer the same, and may further order the defendant to pay such costs as the court shall adjudge reasonable.

<sup>1</sup> This does not apply to cases where the sum or value in dispute does not exceed \$50, unless the judge of the district court shall, for the purposes of justice, so prescribe. See post, p. 758.



## XXIX.

If the defendant shall omit or refuse to make due answer to the libel upon the return-day of the process, or other day assigned by the court, the court shall pronounce him to be in contumacy and default, and thereupon the libel shall be adjudged to be taken *pro confesso* against him, and the court shall proceed to hear the cause *ex parte* and adjudge therein as to law and justice shall appertain. But the court may in its discretion set aside the default, and upon the application of the defendant, admit him to make answer to the libel at any time before the final hearing, and decree, upon his payment of all the costs of the suit up to the time of granting leave therefor.

## XXX.

In all cases where the defendant answers, but does not answer fully and explicitly and distinctly to all the matters in any article of the libel, and exception is taken thereto by the libellant, and the exception is allowed, the court may, by attachment, compel the defendant to make further answer thereto, or may direct the matter of the exception to be taken *pro confesso* against the defendant to the full purport and effect of the article to which it purports to answer, and as if no answer had been put in thereto.

## XXXI.

The defendant may object by his answer to answer any allegation or interrogatory contained in the libel which will expose him to any prosecution or punishment for a crime, or for any penalty or any forfeiture of his property for any penal offence.

## XXXII.

The defendant shall have a right to require the personal answer of the libellant upon oath or solemn affirmation to any interrogatories which he may at the close of his answer propound to the libellant, touching any matters charged in the libel, or touching any matter of defence set up in the answer, subject to the like exception as to matters which shall expose the libellant to any prosecution, or punishment, or forfeiture, as is provided in the 31st Rule. In default of due answer by the libellant to such interrogatories, the court may adjudge the libellant to be in default and dismiss the libel, or may compel his answer in the premises by attachment, or take the subject-matter of the interrogatory *pro confesso* in favor of the defendant, as the court in its discretion shall deem most fit to promote public justice.

## XXXIII.

Where either the libellant or the defendant is out of the country, or unable from sickness or other casualty to make an answer to any interrogatory on oath or solemn affirmation at the proper time, the court may in its discretion, in furtherance of the due administration of justice dispense therewith, or may award a commission to take the answer of the defendant when and as soon as it may be practicable.

## XXXIV.

If any third person shall intervene in any cause of admiralty and maritime jurisdiction *in rem*, for his own interest, and he is entitled, according to the course of admiralty proceedings, to be heard for his own interest therein, he shall propound the matter in suitable allegations, to which if admitted by the court, the other party or parties in the suit may be required by order of the court to make due answer; and such further proceedings shall be had and decree rendered by the court therein as to law and justice shall appertain. But every such intervenor shall be required, upon filing his allegations, to give a stipulation with sureties to abide by the final decree rendered in the cause, and to pay all such costs and expenses and damages as shall be awarded by the court upon the final decree, whether it is rendered in the original or appellate court.

## XXXV.

Stipulations in admiralty and maritime suits may be taken in open court, or by the proper judge at chambers, or under his order, by any commissioner of the court, who is a standing commissioner of the court, and is now by law authorized to take affidavits of bail, and also depositions in civil causes pending in the courts of the United States.

## XXXVI.

Exception may be taken to any libel, allegation, or answer for surplusage, irrelevancy, impertinence, or scandal, and if upon reference to a master, the exception shall be reported to be so objectionable, and allowed by the court, the matter shall be expunged at the cost and expense of the party in whose libel or answer the same is found.

## XXXVII.

In cases of foreign attachment, the garnishee shall be required to answer on oath or solemn affirmation, as to the debts, credits, or effects of

the defendant in his hands, and to such interrogatories touching the same as may be propounded by the libellant; and if he shall refuse or neglect so to do, the court may award compulsory process *in personam* against him. If he admit any debts, credits, or effects, the same shall be held in his hands liable to answer the exigency of the suit.

### XXXVIII.

In cases of mariners' wages, or bottomry, or salvage, or other proceedings *in rem*, where freight, or other proceeds of property are attached to, or are bound by the suit, which are in the hands or possession of any person, the court may, upon due application by petition of the party interested, require the party charged with the possession thereof to appear and show cause why the same should not be brought into court to answer the exigency of the suit; and if no sufficient cause be shown, the court may order the same to be brought into court to answer the exigency of the suit, and upon failure of the party to comply with the order, may award an attachment or other compulsive process to compel obedience thereto.

### XXXIX.

If in any admiralty suit, the libellant shall not appear and prosecute his suit according to the course and orders of the court, he shall be deemed in default and contumacy, and the court may, upon the application of the defendant, pronounce the suit to be deserted, and the same may be dismissed with costs.

### XL.

The court may in its discretion, upon the motion of the defendant and the payment of costs, rescind the decree in any suit in which on account of his contumacy and default, the matter of the libel shall have been decreed against him, and grant a rehearing thereof, at any time within ten days after the decree has been entered, the defendant submitting to such further orders and terms in the premises as the court may direct.

### XLI.

All sales of property under any decree in admiralty shall be made by the marshal or his deputy or other proper officer assigned by the court, where the marshal is a party in interest, in pursuance of the orders of the court; and the proceeds thereof, when sold, shall be forthwith paid into the registry of the court by the officer making the sale, to be disposed of by the court according to law.

## XLII.

All moneys paid into the registry of the court shall be deposited in some bank designated by the court, and shall be so deposited in the name of the court, and shall not be drawn out except by a check or checks signed by a judge of the court and countersigned by the clerk, stating on whose account and for whose use it is drawn, and in what suit and out of what fund in particular it is paid. The clerk shall keep a regular book containing a memorandum and copy of all the checks so drawn and the date thereof.

## XLIII.

Any person having an interest in any proceeds in the registry of the court shall have a right by petition and summary proceeding to intervene *per interesse suo*, for a delivery thereof to him; and upon due notice to the adverse parties, if any, the court shall and may proceed summarily to hear and decide thereon, and to decree therein according to law and justice; and if such petition or claim shall be deserted, or upon a hearing be dismissed, the court may in its discretion award costs against the petitioner in favor of the adverse party.

## XLIV.

In cases where the court shall deem it expedient or necessary for the purposes of justice, the court may refer any matters arising in the progress of the suit to one or more commissioners to be appointed by the court to hear the parties and make report therein. And such commissioner or commissioners shall have and possess all the powers in the premises which are usually given to or exercised by masters in chancery in references to them, including the power to administer oaths to and examine the parties and witnesses touching the premises.

## XLV.

All appeals from the district to the circuit court must be made while the court is sitting, or within such other period as shall be designated by the district court by its general rules, or by an order specially made in the particular suit.

## XLVI.

In all cases not provided for by the foregoing rules, the district and circuit courts are to regulate the practice of the said courts respectively, in such manner as they shall deem most expedient for the due administration of justice in suits in admiralty.

## XLVII.

These rules shall be in force in all the circuit and district courts of the United States from and after the first day of September next [1845].

It is ordered by the court, That the foregoing rules be and they are adopted and promulgated as Rules for the regulation and government of the practice of the circuit courts and district courts of the United States in suits in admiralty on the instance side of the courts. And that the reporter of the court do cause the same to be published in the next volume of his reports ; and that he do cause such additional copies thereof to be published, as he may deem expedient for the due information of the bar and bench in the respective districts and circuits.

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ADDITIONAL ADMIRALTY RULES.

DECEMBER TERM, 1850. 10 HOWARD, v.

*Ordered*, that the following supplemental rules be added to the rules heretofore adopted by this court for regulating proceedings in admiralty.

In all suits *in personam*, where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the State, where an arrest is made upon similar or analogous process issuing from the State courts. And imprisonment for debt on process issuing out of the admiralty court is abolished in all cases where by the laws of the State in which the court is held imprisonment for debt has been or shall be hereafter abolished upon similar or analogous process issuing from a State court.

The twenty-seventh rule shall not apply to cases where the sum or value in dispute does not exceed fifty dollars exclusive of costs, unless the district court shall be of opinion that the proceedings prescribed by that rule are necessary for the purposes of justice, in the case before the court.

All rules and parts of rules heretofore adopted inconsistent with this order are hereby repealed and annulled.

DECEMBER TERM, 1851. 13 HOWARD, vi.

*Ordered*, that further proof, taken in a circuit court upon an admiralty appeal, shall be, by deposition, taken before some commissioner appointed by a circuit court, pursuant to the acts of Congress in that behalf, or before

some officer authorized to take depositions by the thirtieth section of the act of Congress of the 24th of September, 1789, upon an oral examination and cross-examination, unless the court in which such appeal shall be pending, or one of the judges thereof, shall, upon motion allow a commission to issue to take such deposition upon written interrogatories and cross-interrogatories. When such deposition shall be taken by oral examination, a notification from the magistrate before whom it is to be taken, or from the clerk of the court in which such appeal shall be pending, to the adverse party, to be present at the taking of the same, and to put interrogatories if he think fit, shall be served on the adverse party or his attorney, allowing time for their attendance after being notified, not less than twenty-four hours, and, in addition thereto, one day, Sundays exclusive, for every twenty miles' travel.

*Provided*, that the court in which such appeal may be pending, or either of the judges thereof, may, upon motion, increase or diminish the length of notice above required.

*Ordered*, that, when oral evidence shall be taken down by the clerk of the district court, pursuant to the above-mentioned section of the act of Congress, and shall be transmitted to the circuit court, the same may be used in evidence on the appeal, saving to each party the right to take the depositions of the same witnesses, or either of them, if he should so elect.

#### DECEMBER TERM, 1854. 17 Howard, vi.

*Ordered*, that the following supplemental rules be added to the rules heretofore adopted by this court, for regulating proceedings in admiralty.

#### RULE NO. LII.

When the defendant in his answer alleges new facts, these shall be considered as denied by the libellant, and no replication, general or special, shall be allowed. But within such time after the answer is filed as shall be fixed by the district court, either by general rule or by special order, the libellant may amend his bill, so as to confess and avoid, or explain or add to the new matters set forth in the answer; and within such time as may be fixed in like manner, the defendant shall answer such amendments.

#### RULE NO. LIII.

The clerks of the district courts shall make up the records to be transmitted to the circuit courts, on appeals, so that the same shall contain the following:—

1. The style of the court.

2. The names of the parties, setting forth the original parties, and those who have become parties before the appeal, if any change has taken place.

3. If bail was taken, or property was attached or arrested, the process of arrest or attachment, and the service thereof, all bail and stipulations, and if any sale has been made, the orders, warrants, and reports relating thereto.

4. The libel, with exhibits annexed thereto.

5. The pleadings of the defendant, with the exhibits annexed thereto.

6. The testimony on the part of the libellant, and exhibits not annexed to the libel.

7. The testimony on the part of the defendant, and any exhibits not annexed to his pleadings.

8. Any order of the court to which exception was made.

9. Any report of an assessor or assessors if excepted to, with the orders of the court respecting the same, and the exceptions to the report. If the report was not excepted to, only the fact that a reference was made and so much of the report as shows what results were arrived at by the assessor, are to be stated.

10. The final decree.

11. The prayer for an appeal and the action of the district court thereon, and no reasons of appeal shall be filed or inserted in the transcript.

The following shall be omitted : —

1. The continuances.

2. All motions, rules, and orders not excepted to, which are merely preparatory for trial.

3. The commissions to take depositions, notices therefor, their captions and certificates of their being sworn to, unless some exception to a deposition in the district court was founded on some one or more of these ; in which case so much of either of them as may be set out. In all other cases it shall be sufficient to give the name of the witness, and to copy the interrogatories and answers, and to state the name of the commissioner, and the place where, and the date when, the deposition was sworn to. And in copying all depositions taken on interrogatories, the answer shall be inserted immediately following the question.

The clerk of the district court shall page the copy of the record thus made up, and shall make an index thereto ; and he shall certify the entire document, at the end thereof, under the seal of the court, to be a transcript of the record of the district court in the cause named at the beginning of the copy made up, pursuant to this rule ; and no other certificate of the record shall be needful or inserted.

*It is further ordered*, that these rules be published in the next volume of the reports of the decisions of this court, and that the clerk cause them to be forthwith printed and transmitted to the several district courts.

JANUARY 22, 1855.

GENERAL RULE, NO. 9.

DECEMBER TERM, 1858. 21 HOWARD.

[This rule has changed in some respects the Sixty-Third Rule, passed December term, 1853, 16 Howard. The changes are indicated in the notes.]

*First.* In all cases where a writ of error or an appeal shall be brought to this court from any judgment or decree rendered thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant, as the case may be, to docket the cause, and file the record thereof with the clerk of this court within the first six days of the term; and if the writ of error or appeal shall be brought from a judgment or decree rendered less than thirty days before the commencement of the term, it shall be the duty of the plaintiff in error or appellant to docket the cause and file the record thereof with the clerk of this court within the first thirty days of the term; and if the defendant in error or appellant shall fail to comply with this rule, the plaintiff in error or appellee may have the case docketed and dismissed upon producing a certificate from the clerk of the court wherein the judgment or decree was rendered, stating the cause and certifying that such writ of error or appeal has been duly sued out and allowed.

And in no case shall the plaintiff in error or appellant be entitled to docket the cause and file the record after the same shall have been docketed and dismissed under this rule, unless by order of the court.<sup>1</sup>

*Second.* But the defendant in error or appellee may, at his option, docket the case and file a copy of the record with the clerk of the court; and if the case is docketed and a copy of the record filed with the clerk of this court, by the plaintiff in error or appellant,<sup>2</sup> within the periods of time above limited and prescribed by this rule, or by the defendant in error or appellee at any time thereafter during the term the case shall stand for argument at the term.

*Third.* In all cases where the period of thirty days is mentioned in this rule, it shall be extended to sixty days in writs of error and appeals from California, Oregon, Washington, New Mexico, and Utah.

<sup>1</sup> In the Sixty-Third Rule, the words "or consent of the opposite party" were added.

<sup>2</sup> In the Sixty-Third Rule this sentence read "by either party within the periods



## GENERAL RULE.

DECEMBER TERM, 1867. 6 WALLACE.

## RULE No. 31.

*Appearance. — Notice of Motions.*

ORDERED, That upon the filing of the transcript of a record brought up by writ of error or appeal, the appearance of the counsel for the plaintiff in error or appellant shall be entered, and no motion to dismiss, except on special assignment by the court, shall be heard, unless previous notice has been given to the adverse party, or the counsel or attorney of such party.

## RULE No. 32.

*Supersedeas.*

*Supersedeas* bonds in the circuit courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including "just damages for delay," and costs and interest on the appeal; but in all suits where the property in controversy necessarily follows the event of the suit, as in real actions, replevin, and in suits on mortgages; or where the property is in the custody of the marshal, under admiralty process, as in the case of capture or seizure; or where the proceeds thereof, or a bond for the value thereof, is in the custody or control of the court, indemnity in all such cases is only required in an amount sufficient to secure the sum recovered for the use or detention of the property, and the costs of the suit and "just damages for delay," and costs and interest on the appeal.

## RULE No. 33.

In cases where final judgment is rendered more than thirty days before the first day of the next term of this court, the writ of error and citation, if taken before, must be returnable on the first day of said term, and be served before that day; but in cases where the judgment is rendered less than thirty days before the first day, the writ of error and citation may be made returnable on the third Monday of the said term, and be served before that day.

of time above limited and prescribed by this rule, the case shall stand for argument at the term."

## DISTRICT COURT RULES IN ADMIRALTY. MASSACHUSETTS DISTRICT.

In cases in admiralty in which an appeal is permitted by law, an appeal may be claimed at any time within ten days, Sundays inclusive, from the time of entering up the final decree, and not afterwards, unless the court for cause shown, shall prescribe a longer or shorter time.

## ADMIRALTY RULE, ADOPTED JUNE 27th, 1855.

In suits *in personam*, where the defendant cannot be legally arrested, the mesne process may be a warrant to attach his goods and chattels to the amount sued for, or if such property cannot be found, to attach his credits and effects to the amount sued for in the hands of the garnishees named therein, or by a simple monition in the nature of a summons to appear and answer to the suit as the libellant shall in his libel or information pray for or elect.

## F O R M S .

MUCH space is generally devoted in works on Admiralty Practice to forms of libels and answers; but this, we think, is, to a great extent, unnecessary. The narrative part of each libel depends so much on the particular facts of the case, that no form can be literally followed, and the commencement and close of all libels and answers are so similar to each other, that we do not deem it necessary to give more than one form, and then state the peculiarities of the different causes of action.

The libel is generally entitled

UNITED STATES OF AMERICA, }  
   \_\_\_\_\_ District. } ss.

To the Honorable \_\_\_\_\_ Judge of the District Court of the United States, within and for the District of \_\_\_\_\_.

According to the forms given in Dunlap's Admiralty Practice, and which are generally followed in Massachusetts, the libel begins as follows: "The libel and complaint of A. B. of \_\_\_\_\_, in the district aforesaid,<sup>1</sup> in a cause of contract.<sup>2</sup> And thereupon this libellant alleges and articulately propounds as follows."

<sup>1</sup> If the libel is *in rem*, it must state that the property is within the district, and if it is *in personam*, the names, and occupations, and places of residence of the parties must be stated. 23d Admiralty Rule.

<sup>2</sup> Or of tort or damage, or of salvage, or of possession, or otherwise, as the case may be. 23d Admiralty Rule.

This form of commencement is, perhaps, not strictly grammatical, and we prefer the form which seems to be in use in other districts, and which we have known used in Massachusetts. This omits the clause, "And thereupon your libellant," etc., and adds the words "alleges as follows." Thus making the libel allege instead of leaving the nominative without a predicate.

Another form is: A. B. of ———, exhibits this his libel, etc. And thereupon the said A. B. alleges and articulately propounds as follows.

The following pleadings in a suit *in rem* against a vessel for non-delivery of goods will serve as a guide for all cases of contract. After one of the above headings, the libel would proceed as follows:—

First. That on the ——— day of ——— 185 , the said ship, whereof A. B. was master, being then in the port of ———, bound on a voyage upon the high seas, and on waters within the admiralty and maritime jurisdiction of the United States and of this honorable court, to wit, from the said port of ——— to ———, the libellant [or here give the name of the shipper of the goods, if the libellant is not the shipper] being the owner of certain goods [describe them], shipped them on board the said vessel in good order and well-conditioned, to be carried and transported in said ship to the said ———, and there to be delivered to your libellant, or his assigns, in like good order, dangers of the sea only excepted, for the freight of ———; with ——— per cent primage and average accustomed, to be paid by your libellant or his assigns. And the said ———, master as aforesaid, at the said port of ———, received said merchandise, and on the ——— day of ———, in the year aforesaid, signed two bills of lading, and delivered the same to the shipper of said merchandise. [Copies of the bills of lading should be annexed.]

Second. That on or after the said ——— day of said ———, the said ship sailed from the port of ——— for the said port of ———, at which port she duly arrived and now is; but notwithstanding your libellant has been at all times and still is ready to receive the whole of said merchandise in good order, and on so receiving the same, to pay the freight and charges thereon, according to the tenor and effect of the said bills of lading, yet ——— of the value of ——— dollars, part of the said ———, shipped as aforesaid, the said master has not yet delivered, but refuses so to do, and owing to the negligent, improper, and careless manner in which the said ——— were partially transported, and for want of proper care on the part of said master and persons employed by him, the said ——— were thrown into the water by the bursting of the boiler, or some portion of the steam apparatus of the steam-lighter, which your libellant avers was not a danger of the sea, wherein the said ———, master as aforesaid, was transporting said ——— from the shore at said

port of ——— to said ship.<sup>1</sup> By reason of which said casting of said goods into the water, as aforesaid, the said master did not transport to said port of ——— the said [describe the goods not delivered] and has so informed your libellant. By reason of which non-performance of the terms of said contract, as set forth in said bills of lading, on the part of said master, as hereinbefore set forth, your libellant has sustained damage to the amount of ——— dollars.

Third. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore the libellant prays that process in due form of law, according to the course of this court in cases of admiralty and maritime jurisdiction, may issue against the said vessel, her tackle, apparel, and furniture, and that all persons claiming any interest therein, may be cited to appear and answer all and singular the matters aforesaid, and that this honorable court would be pleased to decree the payment of the damages aforesaid, with costs; and that the said vessel may be condemned and sold to pay the same, and that the libellant may have such other and further relief in the premises as in law and justice he may be entitled to receive.

A. B.

———, *Proctor for libellant.*

A second count might be filed in such a case, declaring on an agreement to carry the goods by the respondents, independent of the contract of which the bill of lading is the evidence.

The claim may be as follows:—

UNITED STATES OF AMERICA: }  
District Court of the United States. ——— District. }

IN ADMIRALTY.

——— Libellants, *versus* Ship ———.

And now comes before said court, ———, of ———, in the district of ———, and CLAIMS that the said ship ——— is owned by him the said ———, and [state names of owners] all of ———, in the district of ———, and that, according to his best knowledge and belief, no other person is owner thereof; and that he, the said ———, is the agent of the said other owners of said ship, duly authorized to make this claim.

Wherefore he prays that said ship and appurtenances may be delivered

<sup>1</sup> Or, if the goods are delivered in a damaged condition, it is sufficient to state this fact, setting forth the nature and extent of the damage, and the burden of proof is then on the respondent to show the cause of the injury.

to him, upon his entering into such stipulations therefor as this honorable court shall order in the premises.

[Signed.] \_\_\_\_\_.

\_\_\_\_\_ District, ss. [Date.]

Sworn to by said \_\_\_\_\_, before me,  
\_\_\_\_\_.

#### ANSWER

To the Honorable \_\_\_\_\_, Judge of the District Court of the United States for the District of \_\_\_\_\_.

The answer of \_\_\_\_\_, of \_\_\_\_\_, \_\_\_\_\_, part owner of the ship called the \_\_\_\_\_, to the libel of \_\_\_\_\_ against said ship.

First. This respondent says that in the month of December last, the said ship \_\_\_\_\_ was lying in said port of \_\_\_\_\_, bound for \_\_\_\_\_, and that the libellant proposed and agreed to ship on board thereof [describe the goods], upon the terms of freight mentioned in the said libel, to be transported and delivered to the libellants, the dangers of the seas only excepted. But this respondent denies that the whole amount of said goods was ever shipped on board of said vessel, or any larger amount than \_\_\_\_\_, which have been transported and duly delivered to the libellants, besides \_\_\_\_\_ hereinafter mentioned, which have been tendered to the libellants or their agent.

Second. This respondent says that there are no wharves at \_\_\_\_\_ where vessels of the size of the \_\_\_\_\_ can lie, and that the merchandise to be laden on board of such vessels is taken to them on board of lighters propelled by steam, and that on the 20th day of said December, certain goods, being part of those agreed to be shipped, were put on board of a steam lighter called the \_\_\_\_\_, and while the same were on board thereof, the boiler thereof exploded, and the said goods were thrown into the water, of which part were saved in a wet and damaged condition, in consequence of which it was necessary and expedient to sell them, and they were sold; part were afterwards put on board of the \_\_\_\_\_ and brought to \_\_\_\_\_, and have been delivered or tendered to the libellants; part are in the hands of the agent of the libellants in \_\_\_\_\_, for account of the libellants, and the rest were lost; the said goods being those referred to in the said libel as having been shipped on board of the said ship, and not delivered, which said shipment your respondent denies ever to have been made.

Third. This respondent says that the said steam lighter \_\_\_\_\_, was a steamer regularly qualified and certified for such business, duly licensed and constantly employed therein, and that so far as this respondent knows or believes, and as he alleges, was fit, suitable, and proper for such employ-

ment, and what is there termed bay-worthy; and if she was not, which the respondent does not admit but denies, he still insists that the owners of said ship are not in any wise responsible therefor, or liable for any loss which may happen to goods on board thereof intended to be laden on board of the said ship, and being transported thereto; but insists that during the time of such transportation, such goods are at the risk of the owners thereof, and are so considered by the usage of merchants, and that insurance is always made thereon by the owners to cover the same while on board of lighters, and that the said goods were insured on behalf of the libellants against the risk of lighterage, and that the insurers thereon had paid or agreed to pay the loss thereon, and that this libel is promoted for their benefit and at their expense.

Fourth. This respondent further answering says: that the employment of steam lighters at said port of ——— is usual, necessary, and unavoidable, and that in such cases all perils peculiar and incident to that particular kind of navigation are, and ought to be, deemed perils of the seas, for loss and damage, whereby the owners of ships are not and ought not to be held responsible, inasmuch as they cannot by any care or diligence on their part, or that of their servants, or agents, prevent or guard against the same, and that the owners of vessels are not, and ought not, to be held bound to insure the owners of goods against such losses, or any want of care, negligence, or defect in the care, management, navigation, or construction of said steam lighters, because they have no control over the same. And this respondent insists, that if the owners of said ship were ever responsible for said goods, which he wholly denies, yet that they would not be responsible for any loss or damage thereto, by reason of the explosion of the boiler of a steam lighter, the same being a peril of the seas, incident to navigation, in said port.

Fifth. This respondent admits that after the said loss occurred, to wit, on said ———, the master of said ship signed two bills of lading, copies of which are annexed to the said libel, for a certain number of packages of goods, which included those on board of the said lighter, at the time of the said explosion, and of which fourteen only were on board of the said ship when said bills were signed. And this respondent alleges that the said bills were signed by said master under a mistaken idea that he was bound to do so because said goods had been put on board of the said lighter, and under the apprehension and threat that the vessel would be arrested and detained, and loss and damage incurred, if he refused to sign them. And your respondent alleges and insists, that the master of a ship has no authority to sign bills of lading for goods and merchandise, until the same are actually laden on board, and that the owners of vessels are not in any wise responsible on account of bills so signed, unless the goods are actually

shipped on board thereof; and so the owners of said vessel are not liable for any loss or damage to said goods.

Sixth. This respondent further insists, that if the owners of vessels are liable on contracts for the transportation of goods made by the master before the goods are actually shipped on board of the vessel, which he does not admit but denies, yet that, by the maritime law, the vessel itself is not and does not become liable and accountable therefor, until the goods are actually laden on board thereof, and that no suit against the vessel can be maintained for any loss or damage thereto, unless the goods are on board thereof at the time when the same shall occur.

Seventh. This respondent denies that by reason of the matters and things alleged in said libel, the said libellants have sustained damage to the amount of ——— dollars, or any damage or loss for which said vessel is liable.

Wherefore this respondent prays that the said libel may be dismissed, and the said vessel restored to him, and for his costs.

A. B.

C. D. Proctor.

——— District [date].

Signed and sworn to, before me,

——— U. S. Commissioner.

*Suit in rem under Charter-party for Non-delivery of Goods.*

A libel *in rem* under a charter-party against the vessel, for non-delivery of goods, would be very similar to the above, and the charter-party should properly be annexed together with the bills of lading, if any are given.

*Suit in personam for Breach of Charter-party or of Contract of Affreightment.*

In a suit *in personam* for breach of either an ordinary contract of affreightment or under a charter-party, the libel should set forth that the respondents are owners of the vessel.

*Suit in rem for Freight.*

A libel *in rem* against goods for the freight due should set forth the reception of the goods, the arrival of the ship, the notice to the consignee that the goods were ready for delivery, and that an opportunity for inspecting the goods was given, but that the consignee would not receive the goods, nor pay the freight, etc.

*Suit in personam for Freight.*

A libel *in personam* should, if against the owner of the goods, allege the performance of the contract by a delivery, or offer of delivery, and if against the consignee, the libel should allege that the consignee had received the goods.

*Suit in rem for Repairs or Supplies.*

A libel *in rem* for repairs or supplies furnished a foreign vessel should state that at the time the repairs were made, or supplies furnished, the vessel was not owned or enrolled in the State where the supplies were furnished and the repairs made. It should also represent that on a certain day the vessel being at a certain port within the admiralty and maritime jurisdiction of the United States, and being unseaworthy, or needing supplies or repairs, the libellant was requested by the master to repair the vessel, or furnish her with supplies, and that he did so. The repairs or supplies should be stated at length. It should also be alleged that the repairs or supplies were furnished on the credit of the ship, and were necessary and suitable, and that the amount due has not been paid. It has also been held that it is necessary to allege that the supplies or repairs could not have been procured on the credit of the owner of the vessel.

*Suit in personam for Repairs or Supplies.*

Libels *in personam* against the master or owner, in cases of foreign or domestic vessels, are very similar to those *in rem*, and no difficulty will be found in drawing them.

*Suits under Act of 1845.*

Libels under the Act of 1845, conferring jurisdiction upon the district courts over the great lakes and navigable waters connecting the same, should state that the vessel is of twenty tons burden and upwards, that she was at the time enrolled and licensed for the coasting-trade, and employed in commerce between ports in different States and Territories upon the lakes or navigable waters connecting the same.

*Suits for Wages.*

In suits for mariners' wages, the voyage should be accurately described, and the hiring, the performance of duty, and the breach, should be fully set forth. The libel may also pray that the respondent be ordered to produce a copy of the shipping articles.

*Suits on Bottomry Bonds.*

A libel on a bottomry bond, if it is made by the master, should state



the necessity which occasioned the giving of the bond, and that the master had no other means of procuring means to make the repairs. It should also allege the making of the bond, its terms, the departure of the vessel, and her safe arrival at the port where the bond was, by its terms, payable, and that the amount of the bond has not been paid. A copy of the bond should be annexed.

#### *Suits for Salvage.*

In libels for salvage, when the libellants are many in number, the names of the libellants may be inserted in a paper annexed. The libel should describe the position of the vessel or property saved, the danger it was in, with some minuteness of detail, and the services rendered.

#### *Suits in Causes of Collision.*

The libel should set forth the ownership of the vessel, the voyage on which she was bound, and that she was seaworthy and sufficiently provided with tackle, apparel, and furniture. It should then state the time and place of the accident as nearly as possible, the force and direction of the wind, the state of the weather, and the course the vessels were respectively steering. The position of the crew on deck in respect to the lookout, and all measures which were adopted to prevent the collision, should also be stated. It should also aver that the collision and loss were caused wholly by the culpable carelessness and negligence of those on board the other vessel, and that they would not have happened if due caution and proper diligence had been used by those on board the colliding vessel, and that they were in no way caused by those on board the vessel injured. The damage done should then be stated, and if the suit is *in rem*, there should be an allegation that the property is within the jurisdiction of the court.

#### *Suit in a Cause of Damage for an Assault.*

The libel should state the voyage on which the libellant was shipped, and that during the voyage he well and truly performed his duty, and obeyed all the lawful commands of the master and other officers on board the ship. Each injury received, or assault complained of, should be then set forth in a distinct article.

#### *Possessory Suits.*

In a possessory suit the libel should state the ownership of the vessel, setting forth the proportion owned by the libellant, and the reasons which entitle him to the possession, and there should be a prayer that all documents relating to the national character of the vessel be delivered up to

the libellant. The circumstances which may entitle the owner to the possession are so various, that no particular form can be given.

*Petition for the Sale of the Vessel.*

No particular form is necessary for this. The libel should set forth the facts *in extenso* which render the sale necessary, and pray that the court order the same to be made.

*Suits against Proceeds in the Registry.*

These should be by petition, and should state the nature of the petitioner's demand, and should conclude with a prayer that the court will pronounce for the demand, and direct it to be paid out of the proceeds, and for such other relief as the petitioner is in right and justice entitled to, and as the court is competent to give. If a claimant has appeared, there should also be a petition that he be summoned to appear and show cause, if any he has, why the petition should not be granted.

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ANSWERS.

THE manner of beginning and ending answers in admiralty will be seen from the form that we have before given. The same form will also show the manner of drawing the articles which state the defence, and for the matters which may be set up in defence, we refer to several subjects which we have considered in the body of our work.



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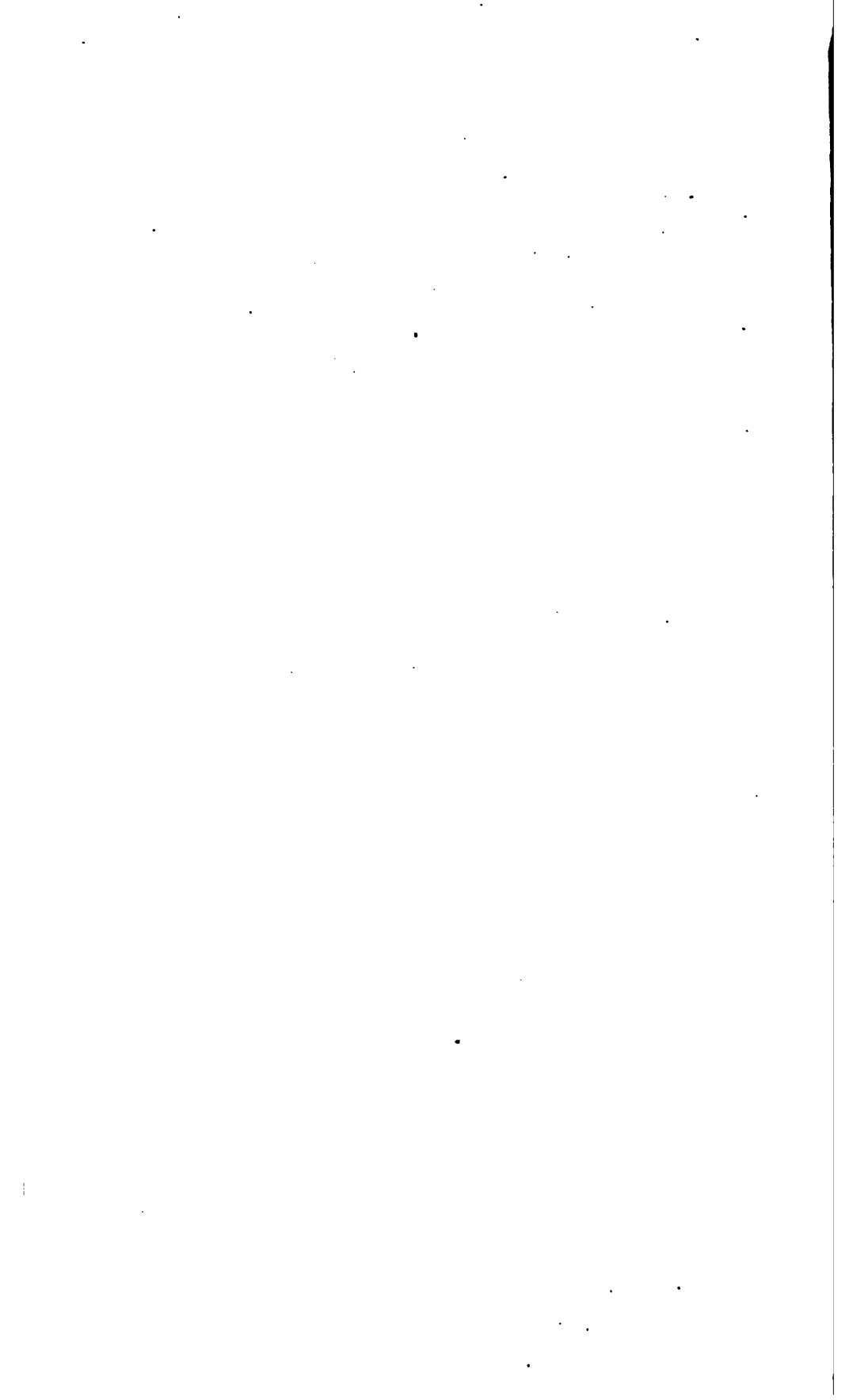
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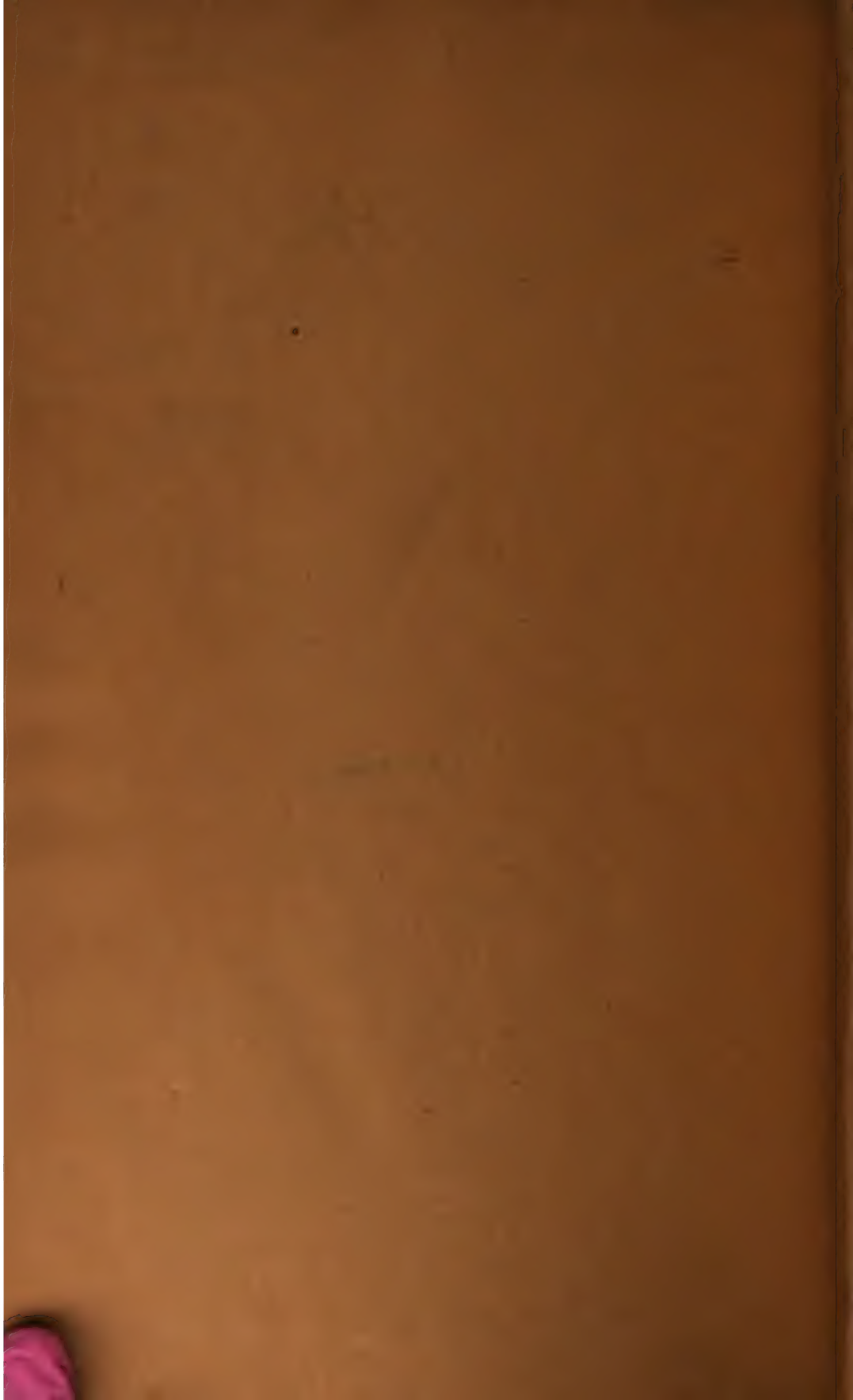
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